TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER, PETITIONER,

vs.

THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED MAY 1, 1941.

CERTIORARI GRANTED JUNE 2, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2] **IN SUPREME COURT OF FLORIDA**

CLYDE HYSLER, Plaintiff-in-Error,

vs.

STATE OF FLORIDA, Defendant-in-Error

PETITION FOR PERMISSION TO APPLY TO THE CIRCUIT COURT, DUVAL COUNTY, FLORIDA, FOR WRIT OF ERROR CORAM NOBIS —Filed April 10, 1941

To the Honorable Justices of Said Court:

Comes now the above named Plaintiff-in-error, Clyde Hysler by his attorney, P. Guy Crews, and respectfully shows unto the Court that on the 15th day of January, A. D. 1937 the said Plaintiff-in-error, Clyde Hysler was indicted by a grand jury of Duval County, Florida, upon a charge of murder in the first degree; that on the 15th day of March, A. D. 1937 the defendant entered a plea of not guilty, and on said date the Court proceeded to trial of said cause which resulted in the verdict of "guilty" without recommendation of mercy on the 5th day of April, A. D. 1937. On the 23rd day of April, A. D., 1937 the Judge of said Circuit Court of Duval County, Florida sentenced the Plaintiff-in-error to be electrocuted; and that thereafter and at the time prescribed by law, the plaintiff-in-error filed his Motion for New Trial, which said motion was overruled by the Judge of the said Circuit Court, and the plaintiff-in-error was allowed ninety days in which to prepare and present his Bill of Exceptions; and that within the time allowed the Defendant did prepare and present his Bill of Exceptions; and that thereafter, to-wit: That within due time on the 24th day of April, A. D. 1937, the plaintiff-in-error sued out a writ of error to this Honorable Court and the said cause was finally determined [fol. 3] by this Honorable Court on the 3rd. day of February, A. D., 1938. This Honorable Court sustaining the conviction, judgment and sentence of the said Circuit Court in and for Duval County, Florida, and afterwards, and within thirty (30) days of the rendition of the judgment in this Honorable Court, Plaintiff-in-error filed his application for a rehearing in said cause which petition for rehearing was denied by this Honorable Court on the 3rd day of June, A. D. 1938.

2nd

This Plaintiff-in-error, now and hereby moves this Honorable Court that he be granted by this Honorable Court the right and privilege of applying to the Honorable Bayard B. Shields, one of the judges of the Circuit Court of Duval County, Florida, said judge being the trial judge in said cause and before whom petitioner was tried and convicted, for a writ of error coram nobis; and in this connection respectfully shows unto the Court that there are certain facts and evidence in existence at the time of said trial and conviction which were unknown to him and also unknown to his attorneys, and which have come to his knowledge long subsequent to his trial, conviction and sentence, and long after the expiration of the time within which he could make his motion for a new trial, and which facts if known to the court at the time of his conviction and sentence would have caused the court to have entered up a different judgment in said cause, to-wit; a judgment in favor of the defendant, and this plaintiff-in-error is advised that if such matters could have been presented to the court during the trial of said cause the sentence and judgment of the court would not have been entered.

3rd

The plaintiff-in-error further respectfully shows unto the court that none of the said matters and things in the last paragraph above referred to could have been known by him or his attorneys, by the exercise by all reasonable diligence because the defendant says that both he and his attorneys exercised all reasonable care and diligence in an attempt to ascertain all matters of fact in relation to his said cause from the time of his arrest up and until and including the present time.

[fol. 4]

4th

That the aforesaid facts, acts and procedure hereinafter and heretofore referred to, that the two (2) witnesses, to-wit; Alvin Tyler and James Baker who were co-defendants of the petitioner, Clyde Hysler, and upon whose testimony the State of Florida relied upon for a conviction of petitioner was coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated in order to compel the said witnesses, Tyler and Baker to give testimony at the trial of said cause against petitioner and to implicate said petitioner in the killing of Mrs. Mamie Surrency; and

further that the said witnesses, Tyler and Baker were promised immunity from the electric chair, by John W. Harrell and further promised if they would implicate Clyde Hysler in said murder and testify against him during the trial of said cause that he as State's Attorney of the Fourth Judicial Circuit of Florida together with other law enforcing officers of Duval County, Florida would see that he did not get the chair, and that they would procure a pardon and have him released from the State Penitentiary after serving three (3) years of his sentence, all of which is more particularly described by reference to a statement and affidavit made by the said James Baker on the 7th day of April, A. D. 1941, also by further affidavit and statement made by the said James Baker on the 8th day of April, A. D. 1941, and also by statement and affidavit made by the said James Baker on the 9th day of April, A. D. 1941, said affidavit being marked "A-b and c" respectively and hereby made a part of this petition as fully as though set out herein in haec verba. And for further reason that said affidavits show that the said petitioner was not implicated in the murder of the said Mrs. Mamie Surrency but that one Joe Peterson, Sr. was the person implicated in said murder and not the petitioner, Clyde Hysler, all of which is set out herein more fully in the affidavits herein above referred to and further substantiated by photostatic copies of the following affidavits, to-wit; affidavit of one Ed. Mosley; affidavit of one A. J. Mooney; affidavit of one Mrs. Ruby Crews and affidavit of one Rudolph J. Dowling, said photostatic copies being marked "d-e-f and g" respectively, and each of said affi- [fol. 5] davits being hereto attached and hereby made a part of this petition as fully as though set out herein in haec verba.

5th

That the said witnesses, Alvin Tyler and James Baker immediately after and following their arrest were held incommunicado for a long period of time without being allowed the benefit and advice of counsel, without being allowed to see or confer with their friends or relatives and without being allowed to confer with the attorneys for the petitioner; that said witnesses, Tyler and Baker were removed from the Duval County Jail and confined in the State Penitentiary at Raiford, Florida with instruc-

tions to allow no one to communicate with them for a long period of time immediately following their arrest, and it became necessary for the attorneys for petitioner to procure an order of the Circuit Court of Duval County for permission to confer with said witnesses several weeks after their arrest, and then only in company with, and in the presence of the attorneys appointed by the Court to represent said witnesses and said attorneys for petitioners made diligent effort to ascertain from said witnesses facts about which they would testify to in trial of said petitioner, and thereby used diligent effort in trying to procure the information as set out herein by the respective affidavits by the witness, James Baker, but said witness Baker was afraid to divulge the truth to the attorneys for the petitioner as set out herein in the said affidavits, a-b and c hereto attached, and that said petitioner was denied a fair and impartial trial by reason of the coercion and intimidation of the witnesses, Alvin Tyler and James Baker and the hope of reward promised them as hereinabove set forth, and has by reason thereof denied equal protection of the law as guaranteed to him by the 14th Amendment to the United States Constitution and was thereby denied due process of the law as guaranteed by the 5th Amendment of the United States Constitution.

6th

That had the said witnesses, Tyler and Baker not been intimidated, coerced and promised immunity from the electric chair by the law enforcement officers in Duval County as described in affidavits "a-b and c" hereto attached, and by John W. Harrell as herein above described, and [fol. 6] the said witnesses had been left free to testify and tell the truth as to the said Joe Peterson, Sr. being the person involved in the murder of the said Mrs. Mamie Surrency instead of the petitioner, said testimony would have prevented the rendition of the judgment, verdict and sentence of petitioner in this cause, and if another trial be had of this cause, this petitioner would be acquitted.

6-A

Petitioner attaches hereto affidavit of James Baker in his own handwriting marked Exhibit "I" and hereby

makes it a part of this petition as fully as though set out herein in haec verba.

7th

That in further support of said witnesses, Tyler and Baker being held incommunicado and being not allowed to confer with their friends or relatives, petitioner has hereto attached affidavit from Joe Sears, Jr. Esquire and H. L. Anderson, Esquire, attorneys who represented petitioner during trial of said cause, said affidavits being marked "h", said affidavits being hereby made a part of this petition as fully as though set out herein haec verba.

8th

That petitioner further alleges that the affidavits of the witness, James Baker, being affidavits hereto attached and marked "a-b and c" and made by the said James Baker freely and voluntarily on his part and without any suggestion or prompting on the part of petitioner or any one on his behalf, and that the statements contained in said affidavits were made in the presence of several prison officials at Raiford, Florida after said James Baker made a voluntarily request to see and talk with the attorney for petitioner.

9th

That in carrying out the mandate of this Honorable Court the Governor of the State of Florida has duly signed a death warrant which provides for and fixes the date for the execution of petitioner during the week beginning April 14th, A. D. 1941, wherefore the aforesaid, Clyde Hysler moves this Honorable Court for leave to file a petition for writ of error coram nobis in the Circuit Court [fols. 7-8] in and for Duval County, Florida and that the judgment and sentence heretofore entered in the said cause be stayed until the Circuit Court in and for Duval County, Florida has disposed of the petition for writ of error coram nobis.

(Signed) Clyde Hysler, Plaintiff-in-Error.

(Signed) P. Guy Crews, Attorney for Petitioner.

Duly sworn to by Clyde Hysler and P. Guy Crews. Jurats omitted in printing.

[fol. 9] EXHIBIT "A" TO PETITION

Raiford, Florida.

Conference held with James Baker in the Flat Top Court Yard at the State Prison Farm, Raiford, Florida Monday, April 7th. A. D. 1941 between 5:00 and 6:00 o'clock P. M.

Personally appeared before me an officer duly authorized to administer oaths and take acknowledgments, James Baker, who, after being first duly sworn, deposes and says:

That after the killing of Mr. and Mrs. Surrancy near Grand Crossing in Jacksonville, Florida on the 23rd day of November 1936, that he and Alvin Tyler, the man who was with him at the time of the said killing agreed between them while they were in Cracker Swamp in the Marietta section of Duval County, that they would lay the blame of the planning of the robbery of the Surrancys upon Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well, and for the reason that the Hyslers bore a bad reputation in Duval County, and for the further reason that Clyde Hysler's father had plenty of money and they thought that by laying the planning of the robbery of the Surrancys on Clyde Hysler that his father and his other relatives would put up sufficient money to get Clyde Hysler out of the trouble and that by laying it on to Clyde Hysler that he, James Baker and Alvin Tyler would escape the death penalty, that in truth and fact, that Clyde Hysler was not implicated in the planning of the robbery and had nothing to do with the killing of Mr. and Mrs. Surrancy, but that one Joe Peterson, Sr. was the man who planned the robbery and hired the said James Baker and Alvin Tyler to perform the robbery after being advised by the said Joe Peterson that it would be no trouble, and that Mr. Surrancy did not carry a gun, and all they would have to do would be to point the pistol at him and take the money, that affiant further deposes and says:

That Clyde Hysler was in no way responsible for the attempted robbery of Mr. and Mrs. Surrancy; that he had nothing to do with it, and the man who planned the robbery and was supposed to protect us in the robbery was Joe Peterson and not Clyde Hysler; that Joe Peterson was [fol. 10] in the immediate vicinity when the attempted robbery and the killing of the Surrancys took place, and had it not been that Joe Peterson planned the robbery and

hired Alvin Tyler and myself to rob Mr. Surraney they would probably have still been living and we would not be in any trouble.

James Baker Questioned.

By Mr. Crews:

Q. Baker what kind of a looking man was Joe Peterson, Sr.?

A. He is a man about 5 feet and 7 or 8 inches tall, weigh around 195 to 200 pounds, kinda red skin and short neck and mostly wore a cap.

Q. How long had you known Joe Peterson before this——

A. Since 1925, I had no dealing with him then, I started dealing with him in 1936.

Q. What kind of dealings did you have with him?

A. Bought whiskey from him once in awhile.

Q. Where had you started working when you starting buying whisky from him?

A. I wasn't working any where when I started buying whisky from him.

Q. Was you ever in his home?

A. Yes, sir.

Q. Did you ever eat in his home?

A. Yes, sir, not at his table, you know about where I ate.

Q. Where did Joe Peterson first mention the robbery of Mr. Surraney to you?

A. At Lennox and Edgewood.

Q. There in Jacksonville, Florida?

A. Yes, Sir.

Q. What did he tell you, the best you can remember?

A. He asked me where was I working at the time, and I told him no place I was selling a little bolita and he said, you can't make no money at that, and I told him that was the best I can do right away, I was just out of the hospital and I was behind in my room rent, and he asked me did I want to borrow some money, I told him yes but I don't have no way right now to pay you back, he said that was [fol. 11] alright that he would let me have it, he gave me $10.00, a few days later I was back out there in the same place selling bolita at Lennox and Edgewood and he asked me if I wanted to make some money, and I told him yes, he said I got a little job for you, and I asked him was he ready for me to start on this little job now, and he said no, that

he would let me know in a few days, when he asked me about going out to rob these people I told him no that I couldn't do that, and he says that you have got to pay me my money, I told him that I have got to go see my brother and get it from him, he said he didn't want it like that, said that I was poor and didn't have nothing and he was going to give me a chance to pay him his money and make some for myself, and after that he started threatening me and following me down, and had a man, I don't know who he was, to follow, you know a trailer—Alvin Tyler used to work for him——

Q. You mean Alvin Tyler used to work for Joe Peterson?

A. Yes, sir, the law knows that, Alvin Tyler used to run a house and sell all of Mr. Joe's liquor down on Orange Street, he and a man named C. W.

Q. Was C. W. a white man?

A. No, sir, colored—but I never would promise him that I would go with Tyler to do this until he got mad and struck me over the eye, "You see this scar" (indicating) over my left eye, and I got scared and told him that I would go with Alvin Tyler, I was afraid that he would kill me or have me killed cause I know he had killed a man.

Q. Now Baker, I don't want you to tell me anything except the truth, I want you to tell me if Joe Peterson was the man that got you into all of this instead of Clyde Hysler.

A. Yes, sir, he is the man.

Q. Then you and Alvin Tyler planned to lay this all on Clyde Hysler in order to try to get out of it yourself or to get a life sentence instead of the chair?

A. Yes, sir.

Q. How long has it been since you have seen Clyde Hysler last past?

A. I haven't seen him since his last trial in 1937.

[fol. 12] Q. Was that in Jacksonville?

A. Yes, sir.

Q. When was you removed from the Duval County Jail to Raiford?

A. I was brought down here this afternoon.

Q. Who brought you down here?

A. Mr. Gene Griffen, Mr. Dick Barker and another man by the name of Mr. Buck, he is a city fireman, he is a little chunky man and a mighty fine man.

Q. Have you talked to or been talked to by Mr. Clyde Hysler or any of his relatives since the last trial of Clyde Hysler in 1937?

A. No, sir, I haven't seen or talked to any of them or seen Mr. Clyde since the last trial, I can prove it by all of the jailers down there, and the night crew too.

Q. You say down there, you mean the Duval County Jail?

A. Yes, sir.

Q. Has any of the Hyslers or any one else promised you anything for making this statement?

A. No, sir, I haven't seen any of them.

Q. Baker, you know who I am, I am P. Guy Crews, Attorney in Jacksonville and I presented Clyde Hysler's petition to the Pardon Board to have his sentence commuted from death to life imprisonment, have I talked to you or had any conference at any time since you were first arrested in this case for the murder of Mr. and Mrs. Surrancy?

A. I a-nt never talked to you until last Saturday afternoon when you came to the jail to see Cornelius Purdy and I saw you there while your was talking to Cornelius Purdy and I told you I wanted to talk to you cause I knew you was Mr. Clyde's Lawyer.

Q. You are making these statements and this affidavit of your own free will and accord without any hope or reward or fear of punishment, and without any intimidation and realizing that you are likely to die next week?

A. Yes, sir, but that is the truth.

Q. Do you say that all the statements you have made in here is the truth and nothing but the truth?

A. Yes, sir.

Q. Since you and Tyler escaped jail have you ever heard from Tyler?

A. Twice.

[fol. 13] Q. How did you hear from him? How long after he got out of jail?

A. First time was six or eight months after he was gone.

Q. After he was gone?

A. Yes, sir. I heard from him the middle of 1939, the 4th of July 1939, I heard from him. I could send you to two people right now who saw him, if they knew who you was——

Q. You want care to mention their names?

A. No, sir.

Q. Baker did you know a woman by the name of Miss Ruby who was a girl friend of Mr. Petersons who later married a man by the name of Crews?

A. Yes, sir, I know Miss Ruby, I knew her well.

Q. Did you know a man who was in the Duval County Jail during August and September 1939, a trustee by the name of Rudolph J. Dowling?

A. Yes, sir, we called him "darling" every body used to call him that, call him "darling" he used to work at the Fruit Growers Express his self, his wife died—his first wife.

Q. During the time Mr. Dowling was trustee in the Duval County Jail did you send word by him to Mr. Joe Peterson to tell him to come down there and see you, and please bring something that you had been keeping your mouth shut, that you hadn't told them anything, or in words something like that?

A. Yes, sir, I had known him before I had got in jail and I knew I could trust him.

(Signed) James Baker, Affiant.

Sworn to and subscribed before me this 7th day of April, A. D. 1941. (Signed) H. M. Richards, Notary Public, State of Florida at Large. My commission expires January 10, 1944. (Seal.)

[fol. 14] EXHIBIT "B" TO PETITION

Raiford, Florida,
April 8, 1941.

This conference with JAMES BAKER was held in the Flat Top in Raiford in the afternoon of April 8th, 1941 between 6:00 and 7:00 P. M,

James Baker Questioned.

By Mr. Crews:

Q. Baker, when you was arrested, where did they first take you?

A. To police station.

Q. In Jacksonville?

A. Yes, sir.

Q. How long did they keep you there?

A. Around four or five hours, I arrested—I stayed there until around 3:00 o'clock the next day in the afternoon.

Q. The officers brought you to Raiford?

A. Yes, sir.

Q. You recall what officers brought you over here?

A. Mr. Gene Griffen and Mr. Dick Barker and some more officers.

Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?

A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hulbert did talk to me, that he would get me life imprisonment—life instead of the chair.

Q. Mr. Hubbert talked to you and made promises that you would get life instead of the chair?

A. Yes, sir.

Q. What police——

A. That's what it was, police officers and John Harrell.

Q. John W. Harrell, the State's Attorney at that time?

A. Yes, sir.

Q. Did Mr. Harrell tell you that he would help you get a life sentence if you would testify against Clyde Hysler?

A. He said he wouldn't burn me, that he, Mr. Acosta and Mr. Carson would get me out in three years time.

Q. Was Detective Cannon and—you was talking about and Inspector Acosta——

A. The two men that arrested me, yes sir.

[fol. 15] Q. Now from the time you was arrested, Baker, how long was you kept to yourself before you was allowed to talk to your lawyer or your friends?

A. From the time I was arrested until the 21st of January, till we went back and had my trial set.

Q. The day you were arraigned in Circuit Court for the trial?

A. Yes, sir.

Q. You was held to your self without being allowed to communicate with any of your friends or your lawyer?

A. Yes, sir.

Q. When was you arrested?

A. It was on the 23rd—24—26— when was Thanksgiving Day—just a few days.

Q. You was arrested just a few days after Thanksgiving?

A. Yes, sir.

Q. And you were not allowed to see any lawyer or friends until the 21st of January?

A. They gave orders not to let any one see me or any one talk to me, they gave them orders her (turning and talking to Captain, "you wasn't here was you Captain?". (The Captain answering no) it was Captain Ormond.

Q. Did any of those officers threaten you?

A. They carried me in a dark room——

Q. That was here?

A. No, sir, that was in Jacksonville, they carried me out to Mareitta and whipped me.

Q. What was that with?

A. Something covered up in canvas, I don't know what it was and a piece of hose and something looked like a pine limb.

Q. You remember any of those names?

A. Yes, sir.

Q. Who were they?

A. Mr. Woods, R. L. Woods, and Mr. Carson slapped me two or three times and gave them the black jack to beat me with and three pimps.

Q. That was in the presence of Mr. Woods, Carson and Acosta?

[fol. 16] A. Yes, sir.

Q. That was to try to make you implicate Mr. Hysler in the robbery of Mr. Surrency and Mrs. Surrency?

A. Yes, sir.

Q. And if it hadn't been for the beatings and threats and the promises to get you out of here in three years as you have stated above would you have implicated Mr. Hysler in the case at all?

A. No, sir, cause I told them I didn't no anything about it; and another thing, between Mr. Hysler's first trial and last one, Mr. Harrell came down to the County Jail after I was allowed to see people, I said, don't you know that if you burn Mr. Hysler you will have to burn me too, and he said he could burn the whole Hysler family and don't burn me cause he and Mr. Sidney Hulbert, Mr. Carson and Mr. Cannon and some more officers was going to run the County as long as they were running it.

Q. And now that was between the first trial of Clyde Hyslers and the second trial when he was convicted?

A. Yes, sir.

Q. How long after Clyde Hysler was tried the last time before you was tried?

A. I can't tell you how long that was—I went to Court on the 6th of December 1938-38—no 37.

Q. In other words you were never tried until Mr. Hysler was tried the second time.

A. The second time.

Q. How long was it after you and Tyler testified against Hysler in the second trial before you and Tyler run out of jail in that jail break?

A. About a week.

Q. Did Alvin Tyler testify in both of the trials against Clyde Hysler?

A. He did.

Q. A large number of prisoners escaped from the jail with you and Tyler?

A. 18 of us.

[fol. 17] Q. Was not that escape made during the time when the Duval County Jail was going under some repairs and remodeling?

A. Yes, sir.

Q. Then it was not just a matter of some one helping you and Tyler out of jail, it was just a general jail break?

A. Just a general jail break.

Q. Did you and Clyde Hysler when this occurred have some liquor dealings on?

A. No, sir.

Q. Did you and Tyler take this car at the time these folks were killed——

A. That I don't know—know how Tyler got the car, he had the car.

Q. Tyler was also the man that had the pistol and he was also the man who done the shooting?

A. Yes, sir.

Q. And was Tyler the man who had the pistol after the shooting was over?

A. Yes, sir.

Q. You didn't have it?

A. No, sir.

Q. You didn't pawn it?

A. No, sir, he had the pistol, I don't know what he had did with it.

Q. Baker, how many times did the officers threaten you and beat you after you were arrested?

A. They beat me about three o'clock in the morning to ten o'clock before they got me to say anything.

Q. It was the police made you tell the sheriff's office?

A. Yes, sir.

Q. Was you afraid not to tell them what they wanted you to, afraid they would beat you some more?

A. Yes, sir, if them—I said two words they would slap me, before the sheriff bunch got there they had sent out and bought me dinner, give me $5.00 or $6.00 dollars in money, and said don't tell any body about me being whipped, if anyone asked me, tell them no.

[fol. 18] Q. Then it was a definite promise from Mr. Harrell, the State's Attorney to keep you from burning?

A. He said that he would see that I would get life, but that he would see that I didn't stay at the chain gang but three years.

Q. You say he played off sick to keep from prosecuting you?

A. Yes, sir, Mr. Simpson his assistant and Mr. Hallows prosecuting, the Judge had ordered him to handle the Hysler case straight through, cause Mr. Hollows was not familiar with the case.

Q. Do you know whether or not Mr. Harrell had gone out of office and Mr. Hallows had taken office?

A. Yes, sir, I think he had and that was why the Judge wanted him to carry this thing on through, but I don't be sure.

Q. Is there anything else you want to say along that line about those threats or beatings?

A. No, sir, that is all I can think of right now.

(Signed) James Baker, Affiant. (Seal.)

Sworn to and subscribed before me this 8th day of April, A. D. 1941. (Signed) H. M. Richards, Notary Public, State of Florida. My Commission expires January 10, 1944.

[fol. 19] EXHIBIT "C" TO PETITION

Raiford, Florida,
April 8, 1941.

Further statements made at Raiford, April 8th, 1941, between 8:30 and 9:00 P. M. in the presence of Mr. Prince, Mr. Richard, Mike Jones and Mr. Crews.

Baker questioned by Mr. Crews:

Q. Baker what about the remarks you wanted to make?

A. Where they kicked me.

Q. That at Jacksonville police station?

A. Yes, sir.

Q. Who was that?

A. Mr. Carson, thats who had me at that time, he taken me down there where a bunch of police was shooting pool.

Q. What all did they do to you?

A. Those officers down there asked him if he made me tell him what they wanted to know, and Mr. Carson—Mr. Carson said not yet, and they said, turn him loose with us about 25 minutes and we will make him say anythi , they wanted me to say, and he told them to take me and hold me until they went up into the office and make a call, and while he was gone to make a call they carried me back into a room and put a coat over my head and went to beating me, I got scars on me now, I want to show them to you and its what you call risons, you can get your doctor and he will tell you what was caused from blows——

Q. You still have scars on you from that beating?

A. Yes——

Q. Was those beatings that caused those scars on you to tell on Clyde Hysler?

A. To make me tell anything.

Q. Did they mention Clyde Hysler's name to you while they were beating you?

A. Yes, sir.

Q. Do you know the names of those officers?

A. No, sir, those were new officers to me, they were speed cops, had those things on their shoulders.

Q. Did any of them tell you that Clyde Hysler was mixed [fol. 20] up in the killing or such as that?

A. They said they knew he was in it—and after I told how it was they made me implicate him.

Q. Implicate him?

A. Yes, sir.

Q. As a matter of fact, Hysler was not mixed in it but it was Joe Peterson——

A. They had me hand cuffed behind my back and I was chained and beat me, that was the pimps, Algie and I don't know the others name.

Q. That was Algie?

A. Yes, sir,—and if I had not went out there with intent to rob those people I wouldn't mind going on dieing for it, but I was forced to go out there and me and Mr. Clyde both are going to have to die Monday for something we are not guilty of, although I was out there, but what make me out there, any one man would have went.

Q. Was it because of those threats of Joe Petersons that you already made, caused you to go out there, scared he would kill you?

A. Yes, sir, he had threatened me, and had a man shadow me three days—and Alvin Tyler had a gun.

Q. Baker do you know whether or not Mr. Harrell knew if you was beat up to make you testify?

A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

Q. When you made that statement you couldn't set down.

A. Yes, sir, and I can't set down good, and I wish you and those men could see that now.

Q. No, we want care to see—that's all you want to say.

A. (Baker nodding his head indicating yes.)

(Signed) James Baker, Affiant.

Sworn to and subscribed before me this 9th day of April, A. D. 1941. (Signed) H. M. Richards, Notary Public, State of Florida. (Seal.) My commission expires January 10, 1944.

[fol. 21] (Photostatic Copy)

EXHIBIT "D" TO PETITION

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Ed. Mosley who, first being duly sworn, deposes and says:

That his name is Ed. Mosley, that he is a resident of 711 Edison Avenue, Jacksonville, Duval County, Florida, that he has been a resident of Duval County all of his life and that he is twenty-five years of age; that three or four days prior to the killing of the Surrenceys that he was over to

his aunt's house, Mrs. Ruby Taylor over on McDuff Avenue, Jacksonville, Florida and Joe Peterson and he was out in the back yard talking a civil conversation, and Joe Peterson asked him if he wanted to make a little money easy and he told him it was according to what it was and how it was to be made, and he put the proposition to him as follows:

"He, Joe Peterson told me that a man went to get a bunch of Fruit Growers Express checks cashed and all I had to do was to stop them along the road with a pistol and take the money and go on along about my business; that the old man didn't carry any pistol to get the checks cashed', and I told him, "I didn't think I wanted to do that" and three or four days later I heard about the Surreneys being killed that runs a Fruit Growers Express Restaurant. They were killed three or four days after Joe Peterson talked to me, by the negroes Baker and Tyler at Grand Crossing, Duval County, Florida.

(Signed) Ed. Mosley.

Sworn to and subscribed before me this 8 day of March, A. D. 1941. Carmen Octogus, Notary Public, State of Florida at Large. (Seal.) My commission expires, June 3, A. D. 1943.

[fol. 22] (Photostatic copy)

EXHIBIT "E" TO PETITION

STATE OF FLORIDA,
County of Duval:

Personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, A. J. Mooney, who after being first duly sworn, deposes and says:

That during October or November 1939 Randolph Dowling came to me a few days after he had been serving time in the County Jail and we just happened to be talking and he told me, "you go by Joe Petersons every day, you tell him that that negro Baker said for him to bring him something, that his wife had died and that he had no one to bring him anything and for him to send something, that he (Baker) was keeping his mouth shut'.

I stopped and seen Joe and Joe said, 'I will send him something or go see him because I am the cause of all of it; then I left right then.

I am running the same restaurant that Mr. Surrency was running when he was killed, there at the Fruit Growers Express and this coming August will be three years that I have been operating the same rest-urant.

(Signed) A. J. Mooney.

Sworn to and subscribed before me this 28th day of March, A. D. 1941. (Signed) Carmen Octogus, Notary Public, State of Florida at Large. (Seal.) My commission expires June 3, A. D. 1943.

[fol. 23] (Photostatic Copy)

EXHIBIT "F" TO PETITION

Statements of Mrs. Ruby Crews, 2410 McQuade Street, Jacksonville, Florida

STATE OF FLORIDA,
County of Duval:

Personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Mrs. Ruby Crews, who after being duly sworn deposes and says:

I have known Joe Peterson, Sr. for many years, practically all of my life, every since I was a little girl and for several years prior to his death we were intimate friends, and from time to time we would talk about the Clyde Hysler case and he has told me several times that he was responsible for the whole thing and that he was the cause of it all, speaking about the death of Mr. and Mrs. Surrancy, and he has told me many times how sorry he was that the whole thing had happened. The statements were made at different times since the death of the Surrancys. The last time he talked to me about the Hysler case and made the statements was on Saturday night before Christmas 1939, Mr. Peterson died in February 1940, the statements were made at my house on McQuade Street here in Jacksonville.

(Signed) Ruby Crews.

Sworn to and subscribed before me this 29th day of March A. D. 1941. (Signed) Carmen Octogus. Notary Public, State of Florida at Large. (Seal.) My commission expires June 3, A. D. 1943.

[fol. 24] (From Photostatic Copy)

EXHIBIT "G" TO PETITION

Fort Pierce, Florida,
March 30th, 1941.

During the months of August and September, until September 13th 1939 I was a trusty in the Duval County Jail, during which time the negro Baker was in there on the Surrency Killing; during the latter part of my time there I was talking with Baker in his cell during feed time and Baker told me that he could trust me because I had known him before he got into this trouble and he told me "you know Mr. Joe" and I said you mean Joe Peterson Sr. and he said "Yes" and then he told me that he wanted me to go to Mr. Joe Peterson and tell him that his people had thrown him down and that none of them would come down to see him and bring him anything and for me to when I got out, to go to Mr. Joe Peterson and tell him "that he wanted him to come down and bring him something; that he had no one to do anything for him and for him to come down to the Duval County Jail and bring him something." Then Baker waited for a few seconds and then he looked at me and said I can trust you and I want you to tell Mr. Joe that I have been keeping my mouth shut; that I haven't told them anything and he will know what I mean."

After I got out of jail on September 13th, 1939 I happened to see Mr. Mooney who runs the Fruit Growers Express Restaurant and I knew that he saw Joe Peterson every day and told him what Baker had said and ask him to tell Peterson about it whether he ever told Peterson about it or not I do not know.

(Signed) Rudolph J. Dowling.

Sworn to and subscribed before me this 30th day of March, 1941. (Signed) J. M. Weed, Notary Public State of Florida. My commission expires Nov. 25, 1944. (Seal.)

[fol. 25] EXHIBIT "H" TO PETITION

STATE OF FLORIDA,
County of Duval:

Before me the undersigned authority, personally appeared H. L. Anderson and W. J. Sears, Jr. to me, well known, who being duly sworn deposes and says:

That affiants are attorneys at law, practicing in the City of Jacksonville, Florida; that affiants represented Clyde Hysler, as his attorneys, in the trial of two (2) cases in Duval County, Florida, wherein said Hysler was charged, in the first case tried, with the murder of John H. Surrency, and in the second case tried, the case of Mamnie Surrency; that affiants have read the above foregoing affidavits of James Baker and know the contents thereof; that the matters, and statements set forth in said affidavits were unknown to affiants prior to, and during the trial of said case and in truth, the contents in said affidavits were first known to affiants on the 8th and 9th day of April 1941, when said affidavits were first read by affiants; that affiants exercised all reasonable care and diligence in an attempt to ascertain all matters of fact in relation to said cases from the time affiants were employed to represent said Hysler until the termination of the trial of said cases; that in the exercise of such diligence and care, affiants made requests of the Circuit Judge, Duval County, Florida, to see and talk with state's witnesses, James Baker and Alvin Tyler prior to said trial; that in accordance with instructions given by said Judge, affiants went to the State Prison Farm, Raiford, Florida, to see said witnesses, and was accompanied on said trip by John E. Mathews, Court Appointed attorney for James Baker and Charles Cook Howell, Court appointed attorney for Alvin Tyler; that at said time said witnesses were questioned at great length by affiants, and said witnesses were particularly questioned as to who was involved in said case, and said witnesses denied that any one was involved in said case other than the defendants named in the indictment; that said witnesses further denied that any statements previously made by them to law enforcement officers were made under duress or with any hope or expectation of reward.

[fol. 26] (Signed) W. J. Sears, Jr., H. L. Anderson,
Affiants.

Sworn to and subscribed before me this 9th day of April, A. D. 1941. (Signed) Carmen Octojus, Notary Public, State of Florida at large. My commission expires June 3, A. D. 1943. (Seal.)

[fols. 27-28] EXHIBIT "I" TO PETITION

—and the law said that the Hyslers got out of every trap that they had set for them but this time I know we got one of them and Mr. Sid say yes and we must get this one clen out of the world in stead of just getting hem out of cisity. And if we do he says we would weaken the Hysler. then Mr. J. A. Harrell said to Alaek Tyler Tyler how do you feel do you think you got a chance? Tyler sid No sid I dont, then Mr. Harrel said no Tyler you and Clyde is sure to buren and I dont see any way of saving you because you don the killing, but I will asure you that as long as you are alive you will never want any thing then he I meen ino the line of money, then Mr. Harrel opend his little wallet and gave Tyler som money just how much I dont know than Mr. Harrel said to me I will give you a start when you get out of prison then I said you are not giving no wooden nickles are you? then he say no I sayed I feel like you will hafter put me in that ole chair if you buren clyd. Mr. Harell again I could buren the whole Hysler family and dont buren you and all i want you to do that do what I say do and I will show you.

(Signed) James Baker.

Raiford, Union County, Florida.

Sworn to and subscribed before me this 9th day of April, A. D. 1941. (Signed) H. M. Richards, Notary Public, State of Florida at Large. My commission expires Jan. 10, 1944. (Seal.)

[File endorsement omitted.]

[fol. 29] IN SUPREME COURT OF FLORIDA

[Title omitted]

BRIEF IN SUPPORT OF PETITION OF PLAINTIFF IN ERROR FOR PERMISSION TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS—Filed April 10, 1941

Question

Should the Plaintiff-in-error be granted leave to file a petition for Writ of Error Coram Nobis in the Lower Court

where his motion sets up that he was convicted of murder in the first degree and sentenced to be executed on the testimony of two witnesses who connected him with the crime and since the judgment of the Lower Court has been affirmed both as to the Plaintiff-in-error and one of the two witnesses, one of said witnesses being under indictment and not tried, commutation of said death sentence as to both the Plaintiff-in-error and the other witness being denied, and then the Plaintiff-in-error learns that the convicted witness was coerced to testify that the Plaintiff-in-error participated in said murder and also said witness was promised a reward, in that, the prosecuting officers promised said witness that if he would implicate the Plaintiff-in-error and testify against him that they would see that he only received a life sentence and that such prosecuting officers would get the said witness a pardon after three years; and said witness now being willing and will testify at a new trial that he and the other witness agreed to "frame" the Plaintiff-in-error and that the Plaintiff-in-error had no part in said murder for which he now stands convicted, and that both of the witnesses who implicated and testified against the Plaintiff-in-error did so under duress and in an attempt to escape punishment themselves and on the promise of the prosecuting officers as set out?

[fol. 30] We say that the motion should be granted.

Statement

Clyde Hysler was convicted and sentenced in Duval County, Florida for murder in the first degree, without recommendation for mercy. He appealed to the Supreme Court of Florida, and his conviction was upheld.

Joinly indicted with Hysler were two negro-s, Alvin Tyler and James Baker, both of whom testified at the trial of Hysler and it was solely upon their testimony that Hysler was convicted. After Hysler was convicted James Baker was tried and convicted, and sentenced to the death penalty, Baker appealed his conviction which was affirmed, Taylor has never been tried.

Hysler and Baker applied to the pardon board to have their sentence commuted to life imprisonment which was denied.

After the date had been set for the execution of both Hysler and Baker, Baker requested the attorney for Hysler to come to see him. In the presence of prison officials, spon-

taneously, without prompting, freely and voluntarily, Baker retracted his testimony given at the trial and explained that one Joe Peterson, Sr., and not Hysler was the person who planned the robbery that resulted in the murder charge. That Baker and Tyler agreed to put the blame on Hysler because of the reputation of the Hysler family and because they believed that the father of Hysler had plenty of money to get Hysler off and if Hysler got off they would get off. That after the arrest of Baker and Tyler, the prosecuting officers beat the said Baker in an attempt to force Baker to implicate Hysler. That he, Baker, at first refused to make any statement but after threats from the law enforcement officers and a promise from the state attorney, that if he would implicate Hysler and testify against him that he would see that Baker would receive a life sentence for his part in the murder and that after Baker had served three years the state attorney would get a pardon for Baker, he implicated Hysler. Baker made affidavits to this affect and also that both he and Tyler believed that when they implicated Hysler and testified against him they [fol. 31] would escape the death penalty. Baker now realizing that he has done Hysler an injustice and is going to die, desires to remedy the wrong done to Hysler, because of the duress and hope of reward coming from the law enforcement officers and the prosecuting officers. None of the facts upon which the motion for lease to file a petition for Writ of Error Coram Nobis were known to Hysler until after the Pardon board had rejected Baker's application for clemency. The attorney's for Hysler attempted to confer with both Baker and Tyler before the trial but were only permitted to talk to such witnesses after and order from the Circuit Court of Duval County, Florida, and then in the presence of the attorneys appointed to defend Baker and Tyler. That if the foregoing matters and things had been known to the Court at the time of Hysler's conviction and sentence a different judgment and sentence would have been entered in said cause, to wit; a judgment in favor of Hysler. All of the facts relied upon by Hysler as to why this Court should grant him leave to file a petition for Writ of Error Coram Nobis are set out in his motion, with supporting affidavits.

Argument. Question

Should the Plaintiff-in-error be granted leave to file a petition for Writ of Error Coram Nobis in the Lower Court

where his motion sets up that he was convicted of murder in the first degree and sentenced to be executed on the testimony of two witnesses who connected him with the crime and since the judgment of the Lower Court has been affirmed both as to the Plaintiff-in-error and one of the two witnesses, one of said witnesses being under indictment and not tried, commutation of said death sentence as to both the Plaintiff-in-error and the other witness being denied, and then the Plaintiff-in-error learns that the convicted witness was coerced to testify that the Plaintiff-in-error participated in said murder and also said witness was promised a reward, in that, the prosecuting officers promised said witness that if he would implicate the Plaintiff-in-error and testify against him that they would see that he only received a life sentence and that such prosecuting officers would get the said witness a pardon after three [fol. 32] years; and said witness now being willing and will testify at a new trial that he and the other witness agreed to "frame" the plaintiff-in-error and that the Plaintiff-in-error had no part in said murder for which he now stands convicted, and that both of the witnesses who implicated and testified against the Plaintiff-in-error did so under duress and in an attempt to escape punishment themselves and on the promise of the prosecuting officers as set out?

The motion for leave to file a petition for Writ of Error Coram Nobis was taken from the motion filed in the case of Lamb v. State, 91 Fla. 396, 107 So. 535, with additional facts set forth.

The Lamb case, supra, lays down the proposition of law that a Writ of Error Coram Nobis will not be granted because a witness committed perjury at the trial, unless it was committed under duress or for the hope of reward, when the Court said a Writ of Error Coram Nobis would be granted, "Where a plea of guilty was entered because of mob violence.

Nickels v. State, 98 So. 497, 502, 99 So. 121 86 Fla. 298."

On authority of the Lamb case, supra, this motion should be granted.

The motion in the Lamb case is set out in Carsons Florida Common Law Pleading. First Edition, page 211.

We call the attention of the Court to the case of Washington v. State, 92 Fla. 740, 110 So. 259, which case leave was granted to file a petition for Writ of Error Coram Nobis because the motion followed closely the motion in the Lamb

case, supra, The Washington case held that Coram Nobis could be granted even though the Judgment had become final due to the fact that a term of the Supreme Court had elapsed. We call the Court's attention to part of the opinion in the Washington case;

However, in view of the fact that the application now before us follows quite closely the allegations of the petition quoted in the Lamb case, supra, and was evidently based upon such case, and in view of the further fact that the date of the execution of the petitioner is so near at hand that to require him to amend his petition at this time might prove fatal both to the petitioner and to the remedy which he seeks to employ, if he be entitled to it, the court will not at this time require such amendment. It seems [fol. 33] to us that the conduct of the State Attorney and the prosecuting officers in the prosecution's of the cause in the Lower Court was characterized by such dominating fraud upon the Court in the suppression of evidence as to affect the judgment of the Court and impair the inherent qualities of accuracy and fairness.

We call the Court's attention to the case of Pike v. State 103 Fla. 594, 139 So. 196, wherein the Court granted leave to file the petition in the Lower Court and afterwards the Lower Court denied the petition on the facts, sustained the Lower Court.

From the opinion:

In April, 1931, Pike applied to this court by petition for leave to apply to the trial judge, Hon. J. C. B. Koonce, for a writ of error coram nobis, and the petition was granted. The judge denied the writ. To that judgment, as hereinbefore stated, the case is here on writ of error.

The contention was made that certain facts, "which would have afforded an effective and complete defense" to the charge against Pike, were not discovered, ascertained, or made known to the court, the defendant, or his counsel, because of duress and unlawful means actually exerted by the prosecution in the trial court to prevent such discovery in due season to be available as a defense and to prevent the rendering of the final judgment.

The question presented by the record, the affirmative or negative answer to which would determine whether the judgment of the court in denying the writ should be affirmed or reversed, is: Was the conduct of the state attorney in

the prosecution of the cause characterized by such dominating fraud upon the court in the suppression of evidence as to affect the judgment of the court and impair the inherent qualities of accuracy and fairness. The basis of the petition in the Pike case, supra, was that the State Attorney concealed from the accused the fact that there was a witness who would testify that the chief prosecuting witness had admitted to him that he, the prosecuting wit- [fols. 34-35] ness committed the murder and not the accused Pike. The Supreme Court of Florida granted the motion of Pike to file the petition in the Lower Court. When the Lower Court heard the case on the petition it found as a fact that there was no fraud. The State Attorney did not conform to what his duties were under the circumstances but that his conduct did not amount to fraud. In the Pike case, as in the case at bar, the facts that were concealed by the prosecuting officers and State Attorneys were conclusive to show that another committed the crime and not the accused. In the Pike case the evidence did not sustain the charge. In the case at bar we ask that the Supreme Court do as it did in the Pike case, supra, and grant to Hysler the opportunity of a hearing to prove the grounds of his motion. It seems to us that this is Hysler's right by virtue of the authority in the Pike case, supra.

It is a cardinal principle of law that justice be meted to all alike. In the case at bar the law enforcement officers and State Attorney did not give to Hysler the fair and impartial trial that all other citizens of the State of Florida are given; for which reason Hysler was denied the equal protection of the law as guaranteed to him under the 14th amendment to the United States Constitution, and in like manner was denied due process of law as guaranteed to him.

Conclusion

We respectfully submit to the Court that on authority of the Lamb case, Washington case and Pike cases, supra, the motion for leave to file the petition for Writ of Error Coram Nobis, should be granted and the execution stayed until the Lower Court has heard the petition.

Respectfully submitted, (Signed) P. Guy Crews. Attorney for Plaintiff-in-Error.

[fols. 36-37] IN SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1941

CLYDE HYSLER, Plaintiff in Error,

vs.

STATE OF FLORIDA, Defendant in Error

ORDER DENYING PETITION—April 11, 1941

Upon consideration of the Petition of Plaintiff in Error for permission to apply to the Circuit Court of Duval County Florida for Writ of Error coram nobis in this cause, it is ordered that said petition be and the same is hereby denied.

A True Copy. Test:

——— ———, Clerk Supreme Court.

[fol. 38] IN SUPREME COURT OF FLORIDA

[Title omitted]

MOTION FOR REHEARING—Filed April 12, 1941

To the Honorable Justices of said Court:

Comes Now The above named plaintiff-in-error, Clyde Hysler, by his attorney, P. Guy Crews, and respectfully shows unto the Court that a petition for permission to apply to the Circuit Court of Duval County, Florida for writ of error corum nobis was duly filed, presented and argued before this Honorable Court on Thursday the 10th day of April, A. D. 1941; that the said petition was denied by order of this Honorable Court on Friday the 11th of April, A. D. 1941, and the said petitioner now respectfully moves the court to vacate and set aside the said order denying said petition and grant to said petitioner a rehearing on said petition on the following grounds, to-wit:

First

That said petition was not heard by a full court, there being absent from the court at said hearing Justice J. B. Whitfield, Justice Alto Adams and Justice Rivers Buford;

that said petition involves the life of the petitioner, Clyde Hysler and is of grave importance and therefore should be heard by the entire court.

[fols. 39-40] Second

That the Exhibits "A", "B" and "C" attached to said petition and made a part thereof contained sworn statements and made by James Baker, co-defendant, with Hysler and a State witness who testified against Hysler and on which testimony the petitioner was convicted of murder in the First Degree; that said sworn statements of the said James Baker were made voluntarily and spontaneously and made in the nature of a dying declaration because the said witness and co-defendant was asked if he was changing his stat-ment realizing that he would likely die next week to which he answered, "Yes, but he was telling the truth", and petitioner therefore respectfully represents to the Court that said statement made in the nature of a dying declaration should be given more weight and consideration than the statement made by said witness Baker at the time of the trial when said witness had hopes of escaping the death penalty.

Third

That a writ of error coram nobis being a common law writ and not being changed specifically by Statute, there is no time limit in which said writ could be applied for in this Court.

Petitioner, therefore, respectfully moves this Honorable Court to grant to petitioner a rehearing on said petition and further moves the court to stay any further proceeding or execution of petitioner until such time as said petition can be presented to the full court.

P. Guy Crews, Attorney for Petitioner.

Duly sworn to by P. Guy Crews. Jurat omitted in printing.

[fols. 41-42] In Supreme Court of Florida

[Title omitted]

Order Denying Motion for Rehearing—April 12, 1941

Upon consideration of the Motion of Counsel for Plaintiff in Error for a rehearing on Plaintiff in Error's petition

for leave to apply to the lower court for Writ of Error Coram Nobis, it is ordered that said Motion be and the same is hereby denied.

A True Copy. Test:

——— ———, Clerk Supreme Court.

[fol. 43] IN SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR STAY ORDER PENDING APPLICATION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT—Filed April 12, 1941

Comes now the Plaintiff-in-error and respectfully petitions this Honorable Court for the entry of a stay order, to stay the execution and judgment in the above entitled cause, in order to perfect a petition for Writ of Certiorari to the United States, on the following grounds:

1. That the Plaintiff-in-error desires to prepare and intends to present to the United States Supreme Court his petition for Writ of Certiorari to the order of the Supreme Court of Florida, denying the motion of the Plaintiff-in-error for leave to file in the Circuit Court in and for Duval County, Florida, a petition for Writ of Error Coram Nobis.

2. That the execution of the Plaintiff-in-error is set for the week beginning Monday, April 14th, 1941, and unless the Honorable Court enters its order staying the judgment in the above styled cause it will be impossible for the Plaintiff-in-error to seek redress in the Supreme Court of the United States.

3. That the Plaintiff-in-error desires to have the United States Supreme Court to review the question of whether this Plaintiff-in-error received the equal protection of the law as guaranteed to him under the 14th amendment to the United States at his trial in the lower Court, in view of the matters and things set forth in the motion of the Plaintiff in error for leave to file a petition for Writ of Error Coram [fols. 44-45] Nobis in the Circuit Court of Duval County, Florida.

4. That the Plaintiff-in-error has good basis to petition the Supreme Court of the United States for a Writ of Certiorari, from the order of the Supreme Court of Florida denying the motion of the Plaintiff-in-error for leave to file a petition for Writ of Error Coram Nobis in the Circuit Court of Duval County, Florida, and respectfully suggests to the Court that in and by their order denying the motion of the Plaintiff-in-error for leave to file a petition for a Writ of Error Coram Nobis in the Circuit Court of Duval County, Florida, the Plaintiff-in-error is being deprived of the rights guaranteed to him under the provision of the 14th amendment to the United States Constitution, and is being denied due process of law a- guaranteed to him under the 5th amendment to the United States Constitution.

Wherefore the Plaintiff-in-error respectfully petitions the Court for the entry of a stay order, staying the execution and judgment entered in the above styled cause for a reasonable length of time to permit the plaintiff-in-error to file a petition for Writ of Certiorari in the Supreme Court of the United States.

Respectfully submitted, P. Guy Crews, Attorney for Plaintiff-in-error.

Duly sworn to by P. Guy Crews. Jurat omitted in printing.

[fols. 46-47] IN SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR STAY ORDER—April 12, 1941

Upon consideration of the petition of plaintiff in error for an order staying the execution and judgment entered in the above styled cause for a reasonable length of time to permit plaintiff in error to file a petition for Writ of Certiorari in the Supreme Court of the United States, it is ordered that said Petition be and it is hereby denied.

A True Copy. Test:

——— ———, Clerk Supreme Court.

[fol. 48] IN SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1941

En Banc.

CLYDE HYSLER, Plaintiff in Error,

vs.

STATE OF FLORIDA, Defendant in Error

A Writ of Error from the Circuit Court for Duval County, Bayard B. Shields, Judge.

P. Guy Crews, for Plaintiff in Error.

George Couper Gibbs, Attorney General and Nathan Cockrell, Assistant Attorney General, for Defendant in Error.

OPINION ON MOTION FOR REHEARING—Filed April 14, 1941

BUFORD, J.:

On motion for rehearing on application for an order for leave to apply to the Circuit Court of Duval County for a writ of error coram nobis to review the judgment of conviction of petitioner of the offense of Murder in the First Degree heretofore entered in that Court, on grounds stated in the petition, we have denied the petition for reasons as follows:

(a) This Court may take judicial cognizance of its own records and the record lodged in this Court on the writ of error to the judgment of conviction of the petitioner shows ample evidence to support the judgment of conviction without the aid of the testimony given on that trial by the witness James Baker.

(b) Writ of error coram nobis will not lie because of false testimony given at the trial by important witness. Lamb v. [fol. 49] State, 91 Fla. 396, 107 Sou. 535.

(c) Matters properly presentable for writ of coram nobis are such as would have prevented conviction and not such as may have caused a different result. Chesser v. State, 92 Fla. 754, 109 Sou. 906.

(d) If witness Baker swore falsely at defendant's trial, that fact was known to petitioner at the time of the trial. Washington v. State, 95 Fla. 289, 116 Sou. 470; Pike vs. State, 103 Fla. 594, 139 Sou. 196.

(e) The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness, or that the alleged falsity

of the testimony of the witness Baker was known to the prosecuting officer.

(f) The petition does not show that any alleged mal-treatment of witness was inflicted by any officer of the trial court or that same was known to any officer of the trial court.

(g) The records of this Court, of which we take judicial cognizance, show that petitioner was convicted on trial held subsequent to the trial and confiction of the witness Baker of the offense of Murder in the first degree without recommendation to mercy, and that both trials were conducted on behalf of each defendant by able, diligent and faithful counsel.

(h) If all petitioner alleges in his petition had been true and had been fully made known to the trial court and to the jury which tried the defendant-petitioner, it would not have precluded the entry of the judgment upon a verdict of guilty of Murder in the first degree having been returned by the jury.

So it is, the petition is insufficient to require us to grant same and for such reasons the same was denied and the petition for rehearing is likewise denied.

[fol. 50] So ordered.

Terrell, J. Thomas and Chapman, J. J. Concur.

Brown, C. J. Dissents.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. Enter Clyde Hysler, pro se. File No. 45,357. Florida, Supreme Court. Term No. 64. Clyde Hysler, Petitioner, vs. The State of Florida. Petition for a writ of certiorari and exhibit thereto. Filed May 1, 1941. Term No. 64, O. T. 1941.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 1 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER,

Petitioner,

vs.

THE STATE OF FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

CARLTON C. ARNOW,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER,

Petitioner,

vs.

THE STATE OF FLORIDA.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Clyde Hysler, respectfully shows:

A.

Summary Statement of the Matter Involved.

(1) Present status of the Case.

Petitioner, Clyde Hysler, is now confined in the State Penitentiary in the State of Florida under sentence of death for murder; petitioner is charged with, and convicted for the murder of one Mayme Elizabeth Surrency, a white woman, in November, 1936; jointly indicted with the peti-

tioner Clyde Hysler, were two young, destitute and ignorant negroes, James Baker and Alvin Tyler (R. 1-3), who, several days after their arrest, implicated this petitioner in the death of the said Mayme Elizabeth Surrency, and who testified against this petitioner at the trial in the Circuit Court of Duval County, Florida, wherein this petitioner was convicted and sentenced to die; the testimony of the said James Baker and Alvin Tyler being the only testimony to connect this petitioner with said murder (Tyler's testimony, Trial Record 1027 to 1170; Baker's testimony, Trial Record 1176 to 1327).

A severance was granted as to Alvin Tyler and James Baker (Trial Record 726 to 730) and the petitioner was placed on trial on the second count of the indictment (Trial Record 733), which charged Alvin Tyler with the commission of the murder of Mayme Elizabeth Surrency and the petitioner and James Baker with being a principal in the first degree.

Judgment and sentence of death was imposed on the petitioner on the 23rd day of April, A. D. 1937 (Trial Record 144 to 146).

This Petitioner sued out a writ of error to the Supreme Court of Florida, which on the 3rd day of February, A. D. 1938, affirmed the judgment and sentence of the Circuit Court of Duval County (see *Hysler* v. *State*, 181 So. 354).

The negro, James Baker, was not tried until December 6, 1937 (R. 13), which was subsequent to the conviction of this petitioner for said murder. The said James Baker was tried and convicted for the murder of John H. Surrency, who was killed in the same attempted robbery in which the said Mayme Elizabeth Surrency was killed, and James Baker was sentenced to death, his conviction being based on the testimony given at the trial of this petitioner, the said James Baker being tried long after the conviction of this petitioner. Thereafter, the said James Baker sued out a Writ of Error

to the Supreme Court of Florida, which court on March 14th, 1939, affirmed the judgment and sentence of the Circuit Court of Duval County, Florida.

(See *Baker* v. *State*, 188 So. 634).

On the 7th day of April, 1941, the said James Baker repudiated his testimony given at the trial of this petitioner, and on the 8th and 9th days of April, 1941, explained that he had falsely testified against this petitioner on the promise of the prosecuting officers that they would see that he escaped the death penalty and be sentenced to life imprisonment, and that he would only have to serve three years on a sentence of life imprisonment, when said prosecuting officers would obtain a pardon for him; and further explained that he implicated this petitioner in said crime because of threats and beatings administered to him by the law enforcement officers, and the promise of immunity from the electric chair, and the further promise of a pardon or parole after he had served three years in the State Penitentiary by John W. Harrell, State's Attorney for the Fourth Judicial Circuit of Florida in and for Duval County, Florida, if he, the said James Baker, would testify in behalf of the State of Florida and implicate petitioner in the murder of the deceased, Mayme Elizabeth Surrency; and that the other co-defendant of petitioner, to-wit: Alvin Tyler, also gave his testimony in behalf of the State of Florida against the petitioner under the same circumstances as the testimony given at the trial of petitioner by the witness and co-defendant, James Baker. On the 10th day of April, 1941 (R. 1), this petitioner applied to the Supreme Court of Florida for leave to file an application for Writ of Error *Coram Nobis* before the Circuit Court of Duval County, Florida, which motion was denied on the 11th day of April, 1941 (R. 27). That as shown by the motion of this petitioner filed in the Supreme Court of Florida, for leave to file Petition for

Writ of Error *Coram Nobis*, the said James Baker completely exonerated this petitioner of the crime for which he stands convicted and sentenced to die, and implicated another man named Joe Peterson in said crime (see affidavits, R. 6-16); that the said James Baker and Alvin Tyler gave their testimony implicating this petitioner in said crime because of duress, coercion and hope of reward coming from the prosecuting officer and law enforcement officers of Duval County, Florida. It is claimed and charged in the petition filed in the Supreme Court of Florida (R. 3-4) that the obtaining of false testimony against the petitioner in such a manner deprived the petitioner of the equal protection of the law as guaranteed to him under the 14th Amendment to the United States Constitution.

That the ancient Writ of Error *Coram Nobis* being a common law Writ, and the State of Florida being a common law State following the common law except where modified by statute, and the Supreme Court of Florida having affirmed the judgment of the Circuit Court of Duval County, Florida, against petitioner, and said judgment then becoming the judgment of the said Supreme Court of Florida, it was proper and mandatory that petitioner first apply to the Supreme Court of Florida for permission to file his petition before the Circuit Court of Duval County for Writ of Error *Coram Nobis* (see *Lamb* v. *State*, 107 So. 535, 91 Fla. 396); and that by reason of the Supreme Court of Florida denying petitioner's application for leave and permission to file a petition for Writ of Error *Coram Nobis* before the Circuit Court of Duval County, Florida, petitioner was precluded from filing his said Petition for Writ of Error *Coram Nobis* before the Circuit Court of Duval County, Florida; that this petitioner's conviction for murder, for which he stands convicted and sentenced to die, is based on the false testimony of the said James Baker and Alvin Tyler; that the testimony was extorted by violence and

torture by agents and officers of the State of Florida while acting in their official capacities, and by the hope of reward extended to said witness by agents and officers of the State of Florida. That on the 12th day of April, 1941 (R. 27), this petitioner applied to the Supreme Court of Florida for a rehearing on his motion for leave to apply to the Circuit Court of Duval County, Florida, for a Writ of Error *Coram Nobis*, which application was denied on the 12th day of April, 1941 (R. 28); immediately thereafter, on the 12th day of April, 1941, petitioner filed his motion before the Supreme Court of the State of Florida for a stay of execution, in order that petitioner might have time to apply to the Supreme Court of the United States for Writ of Certiorari, which motion was denied by the Supreme Court of the State of Florida on the 12th day of April, A. D. 1941 (R. 30). It is admitted by the State of Florida that the facts stated in the motion for leave to apply in the Circuit Court of Duval County, Florida, for Writ of Error *Coram Nobis* are true, because the State of Florida did not deny the same, and offered no objection to the granting of said motion. A mere reading of the motion of this petitioner, filed in the Supreme Court of Florida, for leave to apply to the Circuit Court of Duval County, Florida, for Writ of Error *Coram Nobis*, shows that this petitioner was denied the constitutional rights guaranteed him under the 14th Amendment of the Constitution of the United States.

The Supreme Court of Florida entered an opinion on the order denying the petition for rehearing (R. 31-32).

B.

Reasons Relied On for the Allowance of the Writ of Certiorari.

(1) The conviction of petitioner, upon false testimony extorted by violence and torture obtained by agents and officers of the State of Florida while acting in their official

capacities, and obtained by the hope of reward from the agents and officers of the State of Florida while acting in their official capacities, is a denial of the equal protection and due process of the law guaranteed by the 14th Amendment to the Constitution of the United States.

The above questions were seasonably and properly raised in the Supreme Court of the State of Florida, which Court denied the Federal question involved. Petitioner has exhausted his remedy in the State Courts of the State of Florida.

In support of the foregoing grounds of application, your petitioner submits the accompanying brief, setting forth in detail the precise facts and arguments applicable there. Petitioner further states that this application is not filed for the purposes of delay.

Wherefore your petitioner prays that this Court, pursuant to United States Judicial Code, Section 237b, as amended by Act of February 13th, 1925, 43 Stat. 937, issue a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Florida denying the petitioner leave to apply to the Circuit Court of Duval County, Florida for Writ of Error *Coram Nobis*.

All of which is respectfully submitted this 29th day of April, A. D. 1941.

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Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER,

Petitioner,

vs.

THE STATE OF FLORIDA.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court of Florida.

The opinion of the Supreme Court of the State of Florida has not been officially reported. A certified copy thereof is found in the record of the Transcript of record of application for leave to file petition for Writ of Error *Coram Nobis* in the Circuit Court of Duval County, Florida (R. 31). A motion for rehearing was denied in an order appearing in the same record (R. 28-29).

II.

1.

Jurisdiction.

The statutory provision is United States Judicial Code, Section 237b, as amended February 13th, 1925, 43 Stat. 937.

2.

The date of judgment is April 11th, 1941, on which date the Supreme Court of the State of Florida denied the motion of the petitioner for leave to apply to the Circuit Court of Duval County, Florida, for a Writ of Error *Coram Nobis* (R. 27). A petition for rehearing was filed and denied on April 12th, 1941 (R. 28).

3.

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237b, *supra*, appears from the following:

A.

The petitioner herein specifically raised a Federal question as a ground of his motion for leave to apply to the Circuit Court of Duval County, Florida for a Writ of Error *Coram Nobis*, which was denied by respondent. Where conviction and sentence of death rests solely upon false testimony shown to have been extorted from prisoners, and by the hope of reward to such witnesses, who were co-defendants and witnesses against the petitioner, by the officers having them in charge, such acts violate the 14th Amendment to the Constitution of the United States in that it denies the petitioner his rights thereunder.

That he was denied due process of the law and the protection of law, and the equal protection of law by the Supreme Court of the State of Florida guaranteed by the 14th Amendment to the Constitution of the United States in that;

(a) That he was not given a fair, impartial and deliberate trial;

(b) That conviction of petitioner rests solely upon false testimony obtained by force and duress and the hope of reward, and as such was not admissible;

4.

The following cases, among others, sustain the jurisdiction of the Court:

Strauder v. *W. Va.*, 100 U. S. 303; *Neal* v. *Delaware*, 103 U. S. 370; and *Brown* v. *Mississippi*, 297 U. S. 278, all of which are authority for the view that the duty of maintaining constitutional rights of a person on trial for his life transcends mere rules of procedure. In *Brown* v. *Mississippi*, *supra*, it was held that where confessions were obtained by coercion, brutality and violence and were used as a basis for convictions and sentences, such constituted a denial of due process. In *Chambers* v. *State of Florida*, 309 U. S. 227, it was held that where a person's conviction rested upon testimony of three witnesses, co-defendants who testified because of duress and coercion by the officers of the State of Florida, the use of such testimony was a denial of due process.

5.

Statement of the Case.

Mayme Elizabeth Surrency and John H. Surrency were murdered in Jacksonville, Florida, the day before Thanksgiving in November of 1936, in an attempted robbery of the said John H. Surrency. In December of 1936 the petitioner, Clyde Hysler, was jointly indicted with James Baker and Alvin Tyler in two indictments, one charging them with the murder of John H. Surrency and the other charging them with the murder of Mayme Elizabeth Surrency; a severance was requested by the State's Attorney; and petitioner was tried and convicted for the murder of Mayme Elizabeth Surrency on the 5th day of April, 1937, and sentenced to die. At the trial of petitioner, the only testimony to connect this petitioner with said crime was the testimony of James Baker and Alvin Tyler, each of whom testified that this peti-

tioner had planned the robbery in which John H. Surrency and Mayme Elizabeth Surrency were killed; and it was solely upon the testimony of James Baker and Alvin Tyler that petitioner was convicted; petitioner appealed to the Supreme Court of Florida, which affirmed his conviction on the 3rd day of February, 1938 (181 So. 354). The execution of petitioner was set for the week beginning April the 14th, 1941. The witness James Baker sent for the attorney for this petitioner on the 7th day of April, 1941, and on the 7th, 8th, and 9th days of April, 1941 (R. 6, 14, 21), completely repudiated his testimony implicating the petitioner in the murder of Mayme Elizabeth Surrency, and stated that Joe Peterson was the person who planned the robbery resulting in the death of Mayme Elizabeth Surrency, and that he and Alvin Tyler both falsely testified against this petitioner because of beatings administered to them by the law enforcement officers of Duval County, Florida, and the promises made them, that if they would testify against petitioner and implicate him in said crime that they would see that these witnesses escaped the death penalty. Based on the affidavits of said James Baker, on the 10th day of April, 1941, petitioner applied to the Supreme Court of Florida for leave to apply to the Circuit Court of Duval County, Florida, for a Writ of Error *Coram Nobis*, which was denied on the 11th day of April, 1941; the petitioner filed, on the 12th day of April, 1941, petition for rehearing and motion for stay order for time within which to petition the Supreme Court of the United States for a Writ of Certiorari; this petition for Certiorari is based upon the said order of the Supreme Court of Florida denying motion for leave to file petition for Writ of Error *Coram Nobis* in the Circuit Court of Duval County, Florida, and its denial of a rehearing. The Supreme Court of Florida wrote an opinion thereon, Chief Justice Brown dissenting (R. 31-32).

In its opinion the Supreme Court of Florida inadvertently made a mistake in the reasons given as to why it would not grant the petitioner leave to file his petition for Writ of Error *Coram Nobis*. These reasons are as follows (R. 31-32):

"(a) This Court may take judicial cognizance of its own records and the record lodged in this Court on the writ of error to the judgment of conviction of the petitioner shows ample evidence to support the judgment of conviction without the aid of the testimony given on that trial by the witness James Baker.

(b) Writ of error coram nobis will not lie because of false testimony given at the trial by important witness. Lamb *v.* State, 91 Fla. 396, 107 So. 535.

(c) Matters properly presentable for writ of error coram nobis are such as would have prevented conviction and not such as may have caused a different result. Chesser *v.* State, 92 Fla. 754, 109 So. 906.

(d) If witness Baker swore falsely at defendant's trial, that fact was known to petitioner at the time of the trial. Washington *v.* State, 95 Fla. 289, 116 So. 470; Pike *v.* State, 103 Fla. 594, 139 So. 196.

(e) The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness, or that the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer.

(f) The petition does not show that any alleged maltreatment of witness was inflicted by any officer of the trial court or that same was known to any officer of the trial court.

(g) The records of this Court, of which we take judicial cognizance, show that petitioner was convicted on trial held subsequent to the trial and conviction of the witness Baker of the offense of Murder in the first degree without recommendation to mercy, and that both

trials were conducted on behalf of each defendant by able, diligent and faithful counsel.

(h) If all petitioner alleges in his petition had been true and had been fully made known to the trial court and to the jury which tried the defendant-petitioner, it would not have precluded the entry of the judgment upon a verdict of guilty of Murder in the first degree having been returned by the jury.

So it is, the petition is insufficient to require us to grant same and for such reasons the same was denied and the petition for rehearing is likewise denied."

We point out these facts in regard to the court's reasons.

Ground (a). The petition sets out that both *James Baker* and *Alvin Tyler* testified falsely because of duress and force and the hope of reward and their testimony is the only testimony to connect the petitioner with the crime.

Ground (b). The petitioner does not merely rely on the fact that these witnesses testified falsely but in addition charge that the false testimony was obtained by force and duress and the hope of reward coming from the law enforcement officers and the prosecuting officers. The case of *Lamb* v. *State*, 91 Fla. 396, 107 So. 535, is not in point on the question of the force and duress and the hope of reward. The case of *Chambers, et al.*, v. *State of Florida*, 309 U. S. 227, 60 St. Ct. 472, holds that evidence used against an accused obtained by threats of violence invades the rights guaranteed under the 14th Amendment to the United States Constitution.

The *Chambers* case, *supra*, was the outgrowth of the following cases in the Florida Supreme Court:

1. *Chambers, et al.*, v. *State*, 111 Fla. 707, 151 So. 499, 152 So. 437;
2. *Chambers, et al.*, v. *State*, 113 Fla. 786, 152 So. 437;
3. *Chambers, et al.*, v. *State*, 117 Fla. 642, 158 So. 153;

4. *Chambers, et al.*, v. *State*, 123 Fla. 734, 167 So. 697;
5. *Chambers, et al.*, v. *State*, 136 Fla. 568, 187 So. 156.

In the second *Chambers* case, *supra*, the Supreme Court of Florida granted leave to the petitioner to file a petition for Writ of Error *Coram Nobis* in the lower court. Chambers was convicted after trial was had in which his three co-defendants, who had plead guilty, *testified against him.* The United States Supreme Court in the case of *Chambers, et al.*, v. *State of Florida, supra*, found the following facts:

Text-U. S. 225, St. Ct. 476.

"* * *. When Chambers was tried, his conviction rested upon his confession and the testimony of the other three confessors".

In the case at bar the conviction of the petition rests on the testimony of the other two co-defendants *who were confessors.* We say then that if Chambers was entitled to file a petition for Writ of Error *Coram Nobis* that the petitioner herein was and is likewise entitled to be permitted to file a petition for Writ of Error *Coram Nobis.* Therefore there can be no escape from the fact that either false confessions or *false testimony* obtained by force and duress cannot be used against an accused and if it is used it invades the protection guaranteed to him by the 14th Amendment of the United States Constitution.

The Supreme Court of Florida has held in the case of *Deiterle* v. *State*, 98 Fla. 739, 124 So. 47:

"* * * There is some evidence in the record that it was represented to the accused that he had better make good with the State Attorney by telling the truth and that the State Attorney *was his friend.* This latter statement is not clearly shown to have been made, but it is clearly shown that, after accused was warned of his rights, every effort, except physical violence, *and direct promise of reward*, or threats of physical

violence, was used to overcome the will of the accused and to induce or cause him to change the statement which he had made and to make some sort of admission that he was responsible for the death of Ollie Glass".

In the foregoing case the Florida Supreme Court held:

"* * * If the statements alleged to have been made by the defendant during the course of the examination of the officer prior to the time that he was taken out of the room where Ollie Glass died were *freely* and voluntarily made, then we labor under a misapprehension as to the meaning of the words".

We then see that the Florida Supreme Court has held that confessions must be freely and voluntarily made, that is without fear or *the hope of reward.*

In the *Chambers* case, *supra* the United States Supreme Court has held that confessions and the testimony of witnesses against an accused stand on the same basis.

The case of *Lamb* v. *State*, 91 Fla. 396, 107 So. 535, relied upon by the Supreme Court of Florida, did not involve false testimony procured by duress or force or the hope of reward. In the *Lamb* case, *supra*, the Court did say a Writ of Error *Coram Nobis* would be granted where a plea of guilty was entered because of fear of mob violence, quoting the case of *Nickels* v. *State*, 98 So. 497, 502, 99 So. 121, 86 Fla. 208, which case holds that a confession procured by fear is not freely and voluntarily made and is not admissible. We therefore see that the case of *Lamb* v. *State, supra,* relied upon by the Supreme Court of Florida does not discuss false testimony procured by force or duress or the hope of reward.

Ground (c). The Statement of law in this ground relied upon by the Supreme Court of Florida is a correct statement of the law but has no application to the case at bar

for the same reason that the statement of ground (a) is not applicable. Both Tyler and Baker testified falsely against the petitioner and under the same circumstances, and their testimony is the only testimony that implicates the petitioner with the crime. Without their testimony there could be no conviction.

Ground (d). Certainly the petitioner knew that Baker testified falsely at the trial. He also knew that Tyler testified falsely at the trial but he did not know why. Chambers knew that the other co-defendants testified against him, yet the Supreme Court of Florida granted a motion for leave to file a petition for Writ of Error *Coram Nobis. Chambers et al.* v. *State of Florida,* United States, *supra.*

Ground (e). The prosecuting officers in the case of *Chambers et al.* v. *State of Florida,* United States, *supra* had the same knowledge of the alleged mal-treatment of the witnesses as the prosecuting officers in the case at bar. In the *Chambers* case the prosecuting officers believed the defendants guilty the same as the prosecuting officers in the case at bar. The prosecuting officer, the State Attorney in the case at bar is the man who held out the hope of reward, in the case at bar.

Ground (f). The record shows that this ground is not founded on the facts alleged in the petition, which facts are not denied and are not refuted in the record of conviction. Furthermore a convict guard in the *Chambers* case, *supra,* was the person who inflicted the most mal-treatment on the accused was not an officer of the trial court. The State Attorney was the one who offered the reward.

Ground (g). This reason undoubtedly shows that the Supreme Court of Florida inadvertently overlooked the true facts. The petitioner's conviction and appeal is reported in 181 So. 354 and Baker's in 188 So. 634. The petitioner's

conviction was affirmed the 3rd day of February, 1938, Baker's conviction was affirmed March 14th, 1939, a severance was granted Baker, (Trial Record 726 to 730), which clearly shows that Baker was tried after the petitioner. Baker's affidavit (R. 13) states that he was not tried until after the petitioner Hysler was tried. There can be no escape from the fact that the Court was in error as to this ground.

Ground (h). In answer to this ground we say the record clearly shows that the only evidence to connect Hysler with the crime was the testimony of the witnesses Alvin Tyler and James Baker. The means used to get them to testify was the same invasion of the petitioner's rights as the means used in the *Chambers* case, United States, *supra.* The equal protection guaranteed to the petitioner under the 14th Amendment to the United States Constitution was invaded the same as was done in the *Chambers et al.* v. *State of Florida,* United States, *supra,* and was not discovered by the petitioner until long after his trial and conviction and was raised by him, properly so, when he applied to the Supreme Court of Florida for leave to file a petition for Writ of Error *Coram Nobis,* in the Circuit Court of Duval County, Florida. As it now stands it seems to us the petitioner's rights guaranteed to him under the 14th Amendment to the United States Constitution have been violated on the trial in the lower court. That is what he sought to show when he sought leave of the Supreme Court of Florida to apply to the lower court for Writ of Error *Coram Nobis,* the same as Chambers did.

ARGUMENT.

The petitioner's conviction was obtained solely upon false testimony extorted by violence and torture, by and hope of reward from officers and agents of the State of Florida while acting in their capacities, and is a denial of the equal protection and due process of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In the discussion of this question of law we rely on the principles stated by this Court in the case of *Chambers* v. *State of Florida*, 60 Sup. Ct. 472, 309 U. S. 227. There was no denial of the facts stated in the motion for leave to file Writ of Error *Coram Nobis* in the Circuit Court of Duval County, Florida, for the purpose of the hearing before the Supreme Court of the State of Florida, so that the facts alleged in the motion must be taken as true. The refusal of the Supreme Court of Florida to permit the application to be made in the Circuit Court of Duval County, Florida, was final, and the petitioner was thereby prevented from pursuing his only remedy (*Lamb* v. *State*, 91 Fla. 396, 107 So. 535).

We have pointed out that the obtaining of confessions is looked upon in the same manner as the obtaining of the testimony of witnesses; all testimony must be freely and voluntarily given, and not false, springing from fear or the hope of reward.

The conclusion seems inevitable that the method of obtaining testimony herein under discussion and the subsequent conviction while the witnesses were still under the influence of the hope of reward, and who testified falsely, and its use in the sentencing of the petitioner herein, violate the fundamental principles of due process and have been repeatedly condemned by this Court as denying the protection guaranteed by the Constitution of the United States.

Conclusion.

Equal protection and due process under the law are the pillars upon which our democracy rests. A denial of these to the humblest of our citizens is a threat to the liberties of all. Lives and liberties must be taken only in accordance with those established modes of procedure which have been tried and tested by time. If the experience of our centuries of the common law has demonstrated that trial and conviction by honest testimony, openly arrived at, is better than and preferable to false testimony extorted by the Inquisition and the Star Chambers, without benefit of counsel, then it is respectfully submitted that the questions raised in this petition call for the exercise by this Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States and recognized by all civilized nations shall be preserved.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER,

Petitioner,

vs.

STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF OF PETITIONER.

CARLTON C. ARNOW,
P. GUY CREWS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S SECOND BRIEF.

Preliminary Statement.

We shall discuss the portion of the respondent's second brief under the various subheadings designated under the main head of argument.

Argument.

The first subheading of the State of Florida is as follows:

> "Writ of Error Coram Nobis will not lie to relieve one of a judgment of conviction because of false perjured testimony given at the trial by an important witness" (Respondent's brief, page 2).

The foregoing is the first statement of law set forth in the respondent's brief under the main heading of argument, and is not in our opinion a fair statement based on the facts set up in the petitioner's petition filed in the Supreme Court of Florida wherein the petitioner moved the Supreme Court of Florida for permission to file a petition for Writ of Error *Coram Nobis* in the lower court. From the respondent's brief under this heading it would appear that the petitioner merely charged that one of the co-defendants gave false testimony and that petitioner's conviction was not based primarily upon such false testimony. (Respondent's brief, page 3:) The petition filed in the Supreme Court of Florida set up that the only evidence to connect the petitioner with the alleged crime of murder was the testimony of the two co-defendants, Alvin Tyler and James Baker, and that the reason that the two co-defendants testified falsely against the petitioner was due solely to the fact that the prosecuting officers for the State of Florida had promised them that the two co-defendants would be given life sentences and later a pardon rather than be sentenced to death for their participation in said crime of murder (R. 2-3).

Further in paragraph six of the petition filed in the Supreme Court of Florida the petitioner set forth (R. 4) that if the two co-defendants had testified truthfully that no judgment would have been rendered against the petitioner.

It is further set out in the petition filed in the Supreme Court of Florida that in addition to the promises made to the two co-defendants that the two co-defendants were coerced and intimidated (R. 2).

Attached to the petition filed in the Supreme Court of Florida were four sworn statements of James Baker itemized as "Exhibits a, b, c, and i" (R. 6-16 and 21). Exhibit "i" in the petition is a letter written by the co-defendant James Baker and later sworn to as true by him (R. 21).

It is true that the Supreme Court of Florida held in its order denying petitioner's application that the Writ of Error *Coram Nobis* would not lie because of false testimony given at the trial by an important witness as claimed in respondent's brief (Page 3). We do not rely however on the fact that an important witness testified falsely but in addition charged that the false testimony was obtained by force and duress and the hope of reward coming from the law enforcement officers and the prosecuting officers, and rely upon the following *Chambers* cases.

1. *Chambers, et al.;* v. *State*, 111 Fla. 707, 151 So. 499, 152 So. 437;

2. *Chambers, et al.*, v. *State*, 113 Fla. 786, 152 So. 437;

3. *Chambers, et al.*, v. *State*, 117 Fla. 542, 158 So. 153;

4. *Chambers, et al.*, v. *State*, 123 Fla. 734, 167 So. 697;

5. *Chambers, et al.*, v. *State*, 136 Fla. 568, 187 So. 156;

6. *Chambers, et al.*, v. *State of Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716.

The fact that the witness testified falsely is not ground for Writ of Error *Coram Nobis* under the laws of the State of Florida. However, where the only testimony to connect a person with a crime for which he has been convicted is perjured testimony and that testimony is obtained by the hope of reward or by duress or by both, then a different situation is presented and a Writ of Error *Coram Nobis* will lie. This was the holding in the second *Chambers* case, *supra*, and the holding of the United States Supreme Court in the sixth *Chambers* case *supra*, Furthermore the *Chambers* cases are the latest expression of the Supreme Court of Florida in regards to when a Writ of Error *Coram Nobis* should be granted. Another feature of this case that should not be overlooked is the fact that the State of Florida has not denied any of the facts alleged in the petition filed in the Supreme Court of Florida. In the second *Chambers*

case, *supra*, the Supreme Court of Florida held that it was for a jury to determine whether the facts stated on the application for Writ of Error *Coram Nobis* were true.

The State of Florida relies on the case of *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791. We cannot see where the *Mooney* case has anything to do with the case at bar because the basis for the Mooney decision was that there was no remedy for one in the position of Mooney that could be granted under the laws of the State of California. In Florida there is a remedy that has been granted to others similarly situated as the petitioner, Hysler. On the application for a stay order it was pointed out to the court that this was the difference between the *Mooney* case and the case at bar. The petitioner's case comes squarely within the law as enunciated in the *Chambers* cases, *supra*.

We therefore urge the court that the argument of the State of Florida under the first subheading sets forth no reason or authority why the judgment of the Supreme Court of Florida should not be reversed.

The second proposition discussed by the State of Florida is as follows:

> "The application, and exhibits thereto, filed in the Supreme Court of Florida by the petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the equal protection of law guaranteed under the Fourteenth Amendment of the Constitution of the United States."

Under this heading it would appear that the State of Florida is of the opinion that the petitioner, Hysler relies upon a racial discrimination. Such is not the case because the petitioner, Hysler relies upon the fact that he was convicted on the perjured testimony of two young negroes, co-defendants who testified falsely because of the hope of re-

ward and because of duress coming from the law enforcement and prosecuting officers and that where such a conviction is obtained a refusal to grant the petitioner a leave to obtain a Writ of Error *Coram Nobis* is a denial of the equal protection guaranteed to him under the Fourteenth Amendment to the United States Constitution, and it makes no difference whether the convicted persons be white or black. The *Chambers* case, *supra*, was wholly silent on any racial question and the racial question did not enter into the reasons stated either by the Supreme Court of Florida or by the United States Supreme Court.

The third subheading of the State of Florida is as follows:

> "The application, and exhibits thereto, filed in the Supreme Court of Florida by the petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States."

We admit as charged by the State of Florida in its argument under this heading that the co-defendant James Baker repudiated his testimony given at the trial. In addition to this it is perfectly apparent from the record that Baker expected to die the next week and desired to meet his Maker with a clear conscience (R. 9).

It is next alleged by the State of Florida that Baker in his affidavits does not deny the truth of his testimony given at the trial wherein the petitioner Hysler was convicted. The purport and unescapable conclusion from Baker's affidavits is that his testimony given at the trial was false. This is also true in regard to the testimony given by Tyler the other co-defendant. Baker's affidavits plainly show that Tyler also testified falsely for the same reason that Baker testified falsely.

It is claimed that Baker's affidavits are inconsistent. We do not in any way see how this charge can be made. Baker is an ignorant young negro and his answers to questions asked him have all of the grammatical errors and characteristics of uneducated negroes found in the South, yet, a casual reading of them carry with it an abiding conviction that Baker was telling the truth in his affidavits. He expected to die the next week and was confined in a death cell a few feet from the electric chair without a friend to console him, vividly impressed with the gravity of his own position. The State of Florida may pick out portions of his statements and charge that he is not telling the truth but we cannot agree with the State of Florida on that score. It is not the province of the attorneys for the State of Florida to pass upon whether or not Baker is telling the truth, but that question is for a jury to decide and it was for that purpose that the petition was filed in the Supreme Court of Florida by Hysler in order that a jury might pass upon the truthfullness of Baker's statement.

The State of Florida in its brief charges that none of the other supporting affidavits show whether the persons making those affidavits were related to the petitioner, Hysler and carry with this charge the veiled suggestion that those persons were related to Hysler. This has nothing to do with the issues because it will be for a jury to pass upon the truthfulness of those other persons. Had they been related or had counsel believe that the relation of the witnesses to be material their affidavits would certainly have shown their relation. Furthermore it is charged that the persons making the supporting affidavits remained silent during the past four years. An examination of their affidavits show that their testimony relates to matters occurring after the conviction of the petitioner, and all of the affidavits were made in the year 1941.

In regards to the affidavits of the Honorable W. J. Sears, Jr., and the Honorable H. L. Anderson, we point out that they were not the attorneys for Baker or Tyler and that they attempted to determine from Baker and Tyler the truth in order to show that the petitioner, Hysler used diligence in trying to produce true testimony at the trial which is one of the prerequisites to the granting of a Writ of Error *Coram Nobis.* At the time Mr. Sears and Mr. Anderson talked to Baker and Tyler, Baker and Tyler had already been coerced and had already been promised a reward and so it is little wonder that Baker and Tyler did not tell Mr. Sears and Mr. Anderson the truth.

In the *Chambers*, case, *supra*, the attorney for Chambers had no reason to disbelieve the witnesses who testified against Chambers. Writ of Error *Coram Nobis* was granted in the *Chambers* case, notwithstanding.

It is next alleged that there could have been a conviction of Hysler without the testimony of Baker or Tyler. Excerpts from the testimony quoted by the State of Florida, as a basis for this argument falls far short of showing that Hysler had any connection with the killing of Mamie Elizabeth Surrency.

The Chief Justice of the Supreme Court of Florida did not agree with the other members of the Court in denying the petitioner the right to apply to the lower court for a Writ of Error. *Coram Nobis.* We believe that the facts set up in the petition filed by the petitioner, Hysler in the Supreme Court of Florida should be determined by a jury and that the Chief Justice did not want to substitute his opinion on the facts for that of a jury.

Conclusion.

In conclusion we contend that the respondent's brief does not meet the issues made before the Supreme Court of the

United States, and that the case at bar is squarely on all points with the *Chambers* cases, *supra*.

All the petitioner is asking to do is to have a jury in Duval County, Florida pass upon the truthfulness of the facts alleged in his petition filed in the Supreme Court of Florida and to determine whether or not all of the testimony introduced against him to convict him of the murder for which he stands convicted and sentenced to die was false, and procured through unlawful means by the representatives of the State of Florida. If it was false and his conviction rests solely upon false testimony, right and justice should entitle him to a hearing to determine that fact.

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In the Supreme Court of the United States

October Term, 1940

No. ~~1008~~ 64

CLYDE HYSLER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

While the petition fails to show definitely the question presented for the consideration of this court it is presumed that the first paragraph under "B. Reasons relied on for the allowance for the writ of certiorari" expresses the question. The question as stated, however, is not correctly phrased and we shall show that it is not based in its entirety upon matters shown in the affidavits supporting the application for leave to file petition for writ of error coram nobis in the circuit court of Duval County, Florida.

We have not been furnished with any copy of the transcript of record and can only identify the matters to which we may refer by the style of the pleading together with the paragraphs and pages therein and the exhibits thereto.

Wherever reference is made to the Chambers case without any citation as to the place reported, it is to the opinion of this court found in 309 U S 227.

STATEMENT AS TO JURISDICTION

Petitioner has cited the appropriate section of the United States Judicial Code which authorizes this court to bring up for review and determination a final judgment of the highest court of a state wherein the particular matter may be considered when such judgment is claimed to be violative of some provision of the Constitution of the United States. Petitioner contends that the decision by the Supreme Court of Florida in the case of Hysler v State of Florida rendered on April 12, 1941 is violative of the provisions of the Fourteenth Amendment to the Constitution of the United States and cites four cases to support his contention.

The cases of Strauder v West Virginia, 100 U S 303, and Neal v Delaware, 103 U S 370, both involve a matter of discrimination between white and black citizens in the selection of jury lists. The cases of Brown v Mississippi, 297 U S 278; 80 L ed 682 and Chambers v Florida, 309 U S 227, 60 S Ct 472, 84 L ed 716, both involve convictions based upon confessions of the accused obtained by violence. None of the four cases are therefore in point as to this case wherein it is claimed that violence was inflicted upon one witness who after a wait of four years states that such alleged violence caused him to testify falsely against the petitioner.

STATEMENT OF CASE

There are certain parts of the statement of the case in the brief of petitioner which are not in accordance with the facts and beginning with the third paragraph it contains the argument of counsel and not a statement of the case.

Beginning at line 9 of the petitioner's brief under this heading is the following statement:

"At the trial of Petitioner, the only testimony to connect this Petitioner with said crime was the testimony

of James Baker and Alvin Tyler, each of whom testified that this Petitioner had planned the robbery in which John H. Surrency and Mayme Elizabeth Surrency were killed; and it was solely upon the testimony of James Baker and Alvin Tyler that Petitioner was convicted."

and again beginning at line 21 there appears the following statement:

"That he and Alvin Tyler both falsely testified against this Petitioner because of beatings administered to them by the law enforcement officers of Duval County, Florida and the promises made them, that if they would testify against Petitioner and implicate him in said crime that they would see that the witnesses escaped the death penalty."

The transcript of record in the appeal of petitioner to the Supreme Court of Florida from his conviction in the circuit court of Duval County for the murder of Mayme Elizabeth Surrency shows testimony other than that of the negroes Baker and Tyler which corroborates their testimony and definitely connects Hysler, petitioner herein, with the crime. The affidavits of Baker nowhere show that Tyler was beaten or promised any reward to give false testimony. Excerpts from such transcript will be quoted under our argument.

ARGUMENT

HAS THE PETITIONER BEEN DENIED THE EQUAL PROTECTION AND DUE PROCESS OF THE LAW AS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

The Supreme Court of Florida in denying leave to file

a petition in the circuit court of Duval County, Florida, for writ of error coram nobis held that there had been no such denial of the equal protection and due process of the law as guaranteed by the 14th Amendment to the United States Constitution and listed eight reasons why the application should be denied. Counsel for petitioner has based almost his entire argument against the validity of these reasons in his statement of the case instead of under the heading "Argument" where it properly belongs. We will consider these reasons in the order given in the opinion of the Supreme Court of Florida.

(a) THERE IS AMPLE EVIDENCE TO SUPPORT THE JUDGMENT OF CONVICTION WITHOUT THE AID OF THE TESTIMONY GIVEN AT THE TRIAL BY JAMES BAKER.

In order that this court may be saved the labor of reading more than 1500 pages of testimony, we will refer briefly to the evidence so as to show that there was testimony other than that given by Baker which might support the verdict of guilty. Numbers shown after such references are the page numbers where such testimony may be found in the bill of exceptions on the appeal to the Supreme Court of Florida.

The petitioner in his direct examination at the trial stated that he saw James Baker on November 20, 1936 and was asked by Baker for a job hauling whiskey (1697-98); that he took a load of moonshine liquor from Jacksonville to Orlando the following Sunday night November 22 getting back early Tuesday morning November 24 (1702); that he was due to take another load to Palatka on Wednesday, November 25 and went to town Tuesday afternoon to arrange with some one to take the load (1702-03); that he saw Baker with whom was Tyler and arranged for Baker to take the whiskey (1703-04); that he then went to Robert E Lee High

School to see Miss Newsom, a teacher, about borrowing her car (1705-06) and that night arranged with her to take it the next morning (1709-10); that Wednesday morning he met Baker and Tyler and took them to the high school where he had Tyler get Miss Newsom's car (1712); that he then had Baker drive the car with Tyler and gave him some money to get gasoline and told Baker to meet him at Lenox and Edgewood (1713); that he waited at that corner from approximately 9 o'clock to 10:30 o'clock A. M. and then drove to Bud Gardner's house (1714-15); that from then until the middle of the afternoon he was with Bud (1718-25). On cross-examination he stated that while he was waiting at Lenox and Edgewood for the negroes he saw several people, naming them (1811-12), but none of these people were put on the stand to corroborate his statement.

The testimony of Tyler, a witness for the State, was like that of the petitioner in certain parts. After being warned by the trial judge of his constitutional rights (881-83), he stated that he had known the petitioner only since November 24, 1936 (884-85, 889) at which time he was with Baker and got in petitioner's car (890-92); that petitioner said he would see them the next morning (902); that the next morning, Wednesday, November 25, the petitioner came for them and took them to the high school where he, Tyler, got Miss Newsom's car. (903-04.)

Except for the foregoing testimony the statements of petitioner and Tyler do not agree. Tyler stated that the petitioner took Baker and himself out Kings Road on the afternoon of November 24, discussed the proposed robbery of Mr. Surrency and showed them the different roads (894-95); that while they were driving around they met two ladies in a car at a cross road (898-99); that petitioner showed them a gun which they could use (907-08); that

next morning after getting Miss Newsom's car he went in petitioner's car with petitioner and Baker followed in Miss Newsom's car out to Kings Road (910) where petitioner showed them where and how to block Mr. Surrency's car (911) and where he would wait for them (912); that petitioner then gave him the gun fully loaded (912) and that he and Baker left in Miss Newsom's car (916); that after the attempted robbery when he fired all cartridges in the gun, Baker drove the car up a dirt road which ran out and the two of them ran across a field (923) until they saw petitioner in his car and got in it (925); that they were then taken to Cracker Swamp where petitioner left them saying he would come back at night time for them (927); that after remaining in the swamp for a while during which he left his overalls, the two of them left the swamp and went on to town (934, 939-42); that he pawned the pistol (947); and that he definitely identified the revolver in court as the one used by him and given to him by petitioner (955-57.)

The testimony of James Baker, which now more than four years after the trial he attempts to repudiate in part, is substantially like that of Tyler (1027-1178).

There is a great deal of testimony to corroborate that of Tyler as to the points on which he and the petitioner did not agree. The revolver which Tyler identified in court as the murder weapon was shown to have been owned by Joe Bird who pawned it with Ed Bazar (1260). Bazar agreed to let James H. Hysler, father of the petitioner, have it (1272). W. E. Traub, who worked for Bazar, said he turned it over to James H. Hysler (1280-81). Richard Gore, a policeman, said he had seen the revolver in Bazar's place (1287) and that later in October, 1936, he saw it in the hands of Clyde Hysler (1289-90). Girvis Stephenson confirmed the statement of Gore in that he said he was present

at the time Gore stated Clyde Hysler showed a revolver but could not identify it as the one in court (1373-74). A Mrs. Bowling, who had danced and gone around with Clyde Hysler, said she saw a revolver like the one in court in Hysler's pocket two or three times in September, 1936 though she could not identify it as the revolver in court (1303-06). A fire-arms expert from the Federal Bureau of Investigation in Washington identified the bullet which had been taken from the hip of Mrs. Surrency (600, 751) as one which had been fired from the revolver in the court room (1225) and his statement confirmed that of Tyler who testified he had fired it at the holdup.

Mrs. Elizabeth Crawford stated that she was driving the car of Mrs. Bessie Wainwright on Tuesday morning November 24, 1936 and that about 11:45 A. M. she met a car in which Hysler was riding on the front seat and a negro whom she identified as Tyler driving and another negro whom she identified as Baker sitting in the back seat; that this meeting was at the corner of West Fifth Street and Huron; that Tyler honked his horn and they waited for him to turn (1343-45). This was confirmed by Mrs. Wainwright who stated she was sitting in the front seat with Mrs. Crawford (1321-25). A workman for the Atlantic Coast Line Railroad Company, J. C. Peacock, said he saw petitioner with two negroes driving on St. Clair Street, one block from Huron Street, shortly after 11:30 A. M. Tuesday morning, November 24, 1936 (1357). He could not identify the negroes but states that one was driving the car with Hysler sitting beside him and the other was in the back seat (1359).

Miss Laura Newsom confirmed the statement of petitioner that he came on Tuesday afternoon to the high school to borrow her car (1438) and said that he had asked to bor-

row it only for a short while (1439-40); that when she wanted the car about 10:30 A. M. Wednesday morning it was gone and she reported it stolen (1443); that during the afternoon while still at school she received a note; "Report your car stolen. It is all right" (1446). Bud Gardner stated that he took the note from petitioner to Miss Newsom that afternoon (1599-1602) and petitioner himself admitted that he wrote such a note and sent it by Bud (1719-20), though upon cross examination he could give no satisfactory reason why he did not tell Miss Newsom he had turned the car over to the negroes (1788-90) (1803-06).

Mrs. T. J. Baxter testified that she was driving a car in which was seated Mrs. Laura Green and Miss Barbara Atkinson on the morning of Wednesday, November 25, 1936 shortly before 10:00 A. M. when she passed the Surrency car blocked by a car used by two negroes later identified by her as Baker and Tyler (810-15); that after she had passed the two cars and stopped at Kings Road to let Miss Atkinson out she heard shooting (816); that she then drove with the two women to St. Clair Street where Miss Atkinson got out in front of the house of her grandmother (818); that while waiting for Miss Atkinson to return she saw the black negro running on St. Clair street (821) where he got in a black new looking car which left at once (822-23). Similar testimony was given by Mrs. Green (761-809) who said that she turned in the seat at the first shot and saw the light colored negro (Tyler) still shooting (773); that when their car reached the front of the house of Miss Atkinson's grandmother she saw the black negro (Baker) running and get in a new Plymouth or Pontiac sedan which left at once (777-78); that she later identified a car at the police station as the one into which she had seen the negro get (798-99, 807-08). Miss Atkinson testified to about the same facts as Mrs. Green except that she said she did not

see the negro get in the escape car because she was walking over to her mother's house (858-78).

The foregoing excerpts from the evidence given at the trial definitely show a connection of the petitioner with the crime even without the testimony of either Tyler or Baker. There is no showing that Tyler has ever repudiated his testimony and in all points except the actual conversation when the robbery was planned he was corroborated by unimpeached witnesses.

(b) WRIT OF ERROR CORAM NOBIS WILL NOT LIE BECAUSE OF FALSE TESTIMONY GIVEN AT THE TRIAL BY AN IMPORTANT WITNESS.

In the opinion of the Supreme Court of Florida there is cited to uphold this reason the case of Lamb v State, 91 Fla 396, 107 So 535, wherein it had previously considered the basis for a writ of error coram nobis in an exhaustive opinion. Cases from Arkansas, Kansas and Washington were cited as to this particular point.

Petitioner depends upon the case of Chambers v Florida, 309 U S 227, 60 S Ct 472, 84 L ed 716, as authority that where a conviction is obtained upon evidence given by a witness which evidence was obtained by threats of violence there has been a violation of the rights guaranteed by the 14th Amendment to the United States Constitution. We do not agree that the case is such an authority. It was a decision upon a petition for writ of certiorari similar to the instant case but involving four defendants and according to the opinion

"The grave question presented by the petition for certiorari, granted in forma pauperis, is *whether proceedings in which confessions were utilized*, and which culminated in sentences of death upon four young

negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment." (Emphasis supplied).

Again in the same opinion the court said:

"Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined *without reliance upon confessions obtained by means proscribed* by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns." (Emphasis supplied).

It is upon these questions as expressed in the opinion and these alone that the decision was made. It is authority only that a conviction, based upon a confession illegally obtained, whether the conviction is by jury verdict or plea of guilty, must be reversed. It is certainly not authority as counsel for petitioner argues for reversal of a conviction where the defendant did not confess but denied his guilt vigorously and was convicted upon alleged false or perjured testimony whether obtained by violence or otherwise. No such point was argued in that case nor was it decided.

The case of Deiterle v State, 98 Fla 739, 124 So 47 to which petitioner refers is not in point because there it was held when the confession *of the accused* was made through hope of reward it was not freely and voluntarily made. There was no holding that the testimony of a witness given falsely because of a hope of reward would be a cause for reversal.

The case of Nickels v State, 86 Fla 298, 98 So 497, 502, 99 So 121, also cited, held that a plea of guilty entered be-

cause of fear of mob violence was not voluntarily made. Again here it is a forced confession *of the accused* and not the false testimony of a witness against the accused that is the matter involved.

The petitioner therefore has failed utterly in showing any case where the conviction was reversed because of false or perjured testimony given by an important witness.

(c) MATTERS PROPERLY PRESENTABLE FOR WRIT OF ERROR CORAM NOBIS ARE SUCH AS WOULD HAVE PREVENTED CONVICTION AND NOT SUCH AS MAY HAVE CAUSED A DIFFERENT RESULT.

The petitioner agrees that this is a correct statement of the law but in his brief says:

"Both Tyler and Baker testified falsely against the petitioner and under the same circumstances, and their testimony is the only testimony that implicates the petitioner with the crime. Without their testimony there could be no conviction."

This is not a true statement of fact and has no basis of support in the affidavits attached to the petition in the Supreme Court of Florida. There is no affidavit by Tyler that he testified falsely nor is there any statement in any one of the four affidavits made by Baker that Tyler was beaten or offered a reward to testify falsely. The only statement by Baker in these affidavits about the testimony of Tyler is that he and Tyler immediately after the killing and long before either was apprehended agreed to lay the blame upon the petitioner because of the reputation of the Hysler family, (Exhibit A to application for leave to file petition for writ of error coram nobis).

We have discussed under (a) the falsity of the state-

ment that "without their testimony there could have been no conviction".

(d) WRIT OF ERROR CORAM NOBIS IS NOT GRANTED WHERE FACTS WERE KNOWN TO DEFENDANT AT TIME OF TRIAL.

There is no real answer by petitioner to this. Reference in petitioner's brief is again made to the Chambers case when the Supreme Court of Florida granted the application. Chambers v State, 113 Fla 786, 152 So 437. Here again counsel for petitioner confuses the issue. There were four petitioners one who was convicted by a jury verdict upon his own confession and three who were convicted upon their pleas of guilty. The court in passing upon the petition said:

> "The petition then sets forth that the facts which constitute the basis of the petition were unknown to the petitioners, or to their attorneys who represented them at the trial, or to the court at the time of the trials, verdicts, sentences and judgments. These allegations are shown upon the face of the petition to be false because certainly the petitioners knew on the date of the trial about all things which they alleged happened to them prior to the date of the trial."

and again:

> "It is true that each of the petitioners testified during the trials that the confessions introduced were made freely and voluntarily and they also testified that the evidence which they gave then upon the stand was freely and voluntarily given. But, their petition alleges that this testimony was false and given under duress. This presents an issue which the petitioners are entitled to have determined by a court of competent jurisdiction."

Thus the petitions were granted, notwithstanding the fact that the petitioners knew of the facts at the time of the trial, because the confessions were obtained from them by duress and each was convicted by his own testimony as well as by that of the other three. In the instant case the petitioner Hysler was not convicted upon his own false confession or false testimony. If any of the testimony on which he was convicted was false he knew it at the time of the trial and testified then that it was false. The reason why one witness should testify falsely against him is immaterial, whether it be for fear of a beating by the police officers, the hope of any help from the state attorney in getting a pardon, or because of spite held by the witness against the defendant or for any other reason.

(e) THE ALLEGATIONS OF THE APPLICATION IN THE SUPREME COURT OF FLORIDA DO NOT SHOW THAT THE PROSECUTING ATTORNEY HAD ANY GUILTY KNOWLEDGE OF THE ALLEDGED MAL TREATMENT OR THE ALLEGED FALSITY OF THE TESTIMONY OF THE WITNESS BAKER.

Counsel for petitioner says only that in the Chambers case the prosecuting attorney had the same knowledge as in the instant case, yet the judgment of conviction was reversed. The facts upon which the decision in the Chambers case was based have been hereinbefore shown to be entirely different from those in the instant case.

(f) THE ALLEGATIONS OF THE APPLICATION IN THE SUPREME COURT OF THE STATE OF FLORIDA DO NOT SHOW THAT ANY ALLEGED MAL TREATMENT OF THE WITNESS BAKER WAS INFLICTED BY OR KNOWN TO ANY OFFICER OF THE TRIAL COURT.

Counsel for petitioner enter a blanket denial of the facts

stated under this heading without reference to any allegation in the petition or the supporting affidavits. Baker in his affidavits clearly states that the police officers of the city of Jacksonville were the ones who beat him at Marietta (Exhibit B) and at the police station (Exhibit C) and when asked by counsel for petition if the State Attorney knew he was beat up to make him testify said: "none of the sheriff's force knew it at the time" (Exhibit C).

A reference is made by counsel for petitioner to the Chambers case that "a convict guard *** was the one who inflicted the most mal-treatment on the accused was not an officer of the trial court". In the Chambers case however the testimony of both the state witnesses and the defendants shows that it was the sheriff who supervised the procedure of continued interrogation and that the officers of Broward County were in the jail almost continuously during the whole week of questioning the defendants. The opinion (309 U S 235) says:

> "And from arrest until sentence to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the surprise confessions."

It can not be correctly stated that there is any comparison between the Chambers case involving confessions of the defendants under such circumstances and in the instant case involving alleged false testimony where there is no evidence that the ones claimed to have exerted the influence on Baker were ever present during the time he was on the stand as a witness against the petitioner.

(g) THE RECORDS SHOW THAT THE TRIALS OF BOTH THE PETITIONER AND THE WITNESS BAKER WERE CONDUCTED BY ABLE, DILIGENT AND FAITHFUL COUNSEL

AND THAT THE CONVICTION OF PETITIONER WHILE BEFORE IN TIME TO THAT OF THE WITNESS BAKER WAS AFFIRMED BY THE SUPREME COURT OF FLORIDA AFTER THE CONVICTION OF BAKER.

Counsel for petitioner comment only upon an error in the opinion of the Supreme Court of Florida which states that the trial of Hysler for the killing of Mrs. Surrency was after the trial of Baker. The date of the two trials has no bearing upon the issuance of the writ of error coram nobis and the basis of this ground in the opinion of the Supreme Court of Florida is that each of the two defendants "had able, diligent and faithful counsel" in the trial of their cases and the presentation of possible errors upon the appeal to the Supreme Court of Florida. In the Chambers case the point was presented, though not pressed, that the defendants were denied proper counsel based upon a decision made shortly theretofore by the Supreme Court of the United States in the case of Powell v Alabama, 287 U S 45, 52 S Ct 55, 77 L ed 158.

The petitioner Hysler was represented by private counsel both at the trial and in his appeal as well as in his application for leave to apply for writ of error coram nobis and it is well known that his family was at the time of the trial and since then well able to employ any counsel who would be willing to accept the case.

(b) IF ALL THAT IS ALLEGED IN HIS APPLICATION HAD BEEN TRUE AND HAD BEEN FULLY MADE KNOWN TO THE TRIAL COURT AND TO THE JURY WHICH TRIED THE DEFENDANT-PETITIONER, IT WOULD NOT HAVE PRECLUDED THE ENTRY OF THE JUDGMENT UPON A VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE HAVING BEEN RETURNED BY THE JURY.

This is a restatement in different form of the grounds

stated under (c). We have discussed the evidence thoroughly under (a) and believe that it clearly shows that the jury could have convicted the defendant of murder in the first degree even though the testimony of the witness Baker was not allowed to be given because of the facts alleged in his various affidavits.

CONCLUSION

The brief in behalf of the petitioner for writ of certiorari is prepared on the theory that the instant case is on all fours with the Chambers case.

As we have pointed out herein such is not true for the petitioner here did not make any confession nor give any false testimony under duress. The witness Baker says his testimony was false and given under duress but as to the testimony of Tyler there is only the statement of the petitioner and Baker that it was false and the petitioner at the trial testified in his own behalf that both the testimony of Tyler and Baker was false.

The application of the petitioner in the Supreme Court of Florida alleges in paragraph 4 that two witnesses Alvin Tyler and James Baker were "coerced, intimidated, beaten, threatened with violence and otherwise abused, and mistreated in order to compel the said witnesses *** to implicate said petitioner in the killing of Mrs. Mamie Surrency" and also that they "were promised immunity from the electric chair by J. W. Harrell *** if they would implicate Clyde Hysler in said murder" which allegations are stated to be made not upon personal knowledge of the petitioner but upon the attached affidavits of James Baker, one of the witnesses. To support the affidavits of Baker which claimed that Joe Peterson rather than Clyde Hysler hired Baker and Tyler to commit the robbery there are attached four

affidavits by different individuals claiming that Peterson had told them either before or after the attempted robbery that he was the one responsible for it but these affidavits do not state that Peterson said he was the sole person interested in the robbery nor that Clyde Hysler was not also implicated in it.

The affiant Baker is not consistent in his statements. He says in his first affidavit (Exhibit A) in the narrative form where he was not prompted by any questions that he and Tyler agreed "while they were in Cracker Swamp *** that they would lay the blame of the planning of the robbery of the Surrancys upon Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well".

In his second affidavit (Exhibit B) the matter is brought up only by direct questions by Hysler's counsel as follows: "Now what threats or promises did they make you to testify and implicate Clyde Hysler"., (page 1) and "if it had not been for the beatings and threats and promises to get you out of here in three years as you have stated above, would you have implicated Mr. Hysler in the case at all?" (Page 3.) No direct answer was given to the first question and only a simple "No, sir" to the second.

In the third affidavit (Exhibit C) it is in response to a question by counsel for petitioner "did any of them tell you that Clyde Hysler was mixed up in the killing or such as that" that affiant said: "they said they knew he was in it—and after I told them how it was they made me implicate him".

It is plainly shown that until direct questions were asked by counsel for the petitioner calling for affirmative answers Baker did not claim his false testimony to blaming

the robbery on Clyde Hysler was due to any beatings by law officers but it was based upon an agreement between himself and Tyler made immediately after the attempted robbery. He also gave as a reason for blaming it on Hysler that they (Tyler and Baker) knew him well from frequent liquor dealings. Hysler on his direct testimony stated that he had never seen Tyler before the afternoon of November 24, 1936 when Baker said he wanted to take Tyler with him (BE 1703-04). Tyler also said that he first saw Hysler on November 24, 1936 when Hysler came after Baker (883, 892).

We believe that we have fully answered every claim made by petitioner that the ruling of the Supreme Court of Florida was in error and that he was deprived of the rights guaranteed to him by the 14th Amendment to the Constitution of the United States of America. It is therefore urged that the petition for writ of certiorari be denied.

Respectfully submitted,

J. TOM WATSON, Attorney General of the State of Florida.

NATHAN COCKRELL, Assistant Attorney General of the State of Florida.

Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

NO. 64

CLYDE HYSLER,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

NO. 64

CLYDE HYSLER,
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THE STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Supreme Court of Florida from which this Writ of Certiorari was granted is reported as *Hysler* vs. *State of Florida*, 1 So. Rep. 2d Series 628, (not yet published in official Florida Reports). This opinion also appears in the record before this Court at page 31. Other opinions of the Supreme Court of Florida in related cases are: *Hysler* vs. *State*, 187 So. 261, 136 Fla. 563; *Hysler* vs. *State*, 181 So. 354, 132 Fla. 209; *Hysler* vs. *State*, 181 So. 350, 132 Fla. 200; *Baker* vs. *State*, 188 So. 634, 137 Fla. 27.

Jurisdiction

The Supreme Court of the United States granted certiorari in this case on June 2, 1941 (R. 32).

Summary of Argument

1. The Writ of Error Coram Nobis will not lie to relieve one of a judgment of conviction because of false or perjured testimony given at the trial by an important witness

2. The application, and exhibits thereto, filed in the Supreme Court of Florida by the Petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the equal protection of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

3. The application, and exhibits thereto, filed in the Supreme Court of Florida by the Petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

The Writ of Error Coram Nobis will not lie to relieve one of a judgment of conviction because of false or perjured testimony given at the trial by an important witness.

On April 10, 1941, the Petitioner filed in the Supreme Court of Florida his application for permission to apply to the Circuit Court of Duval County, Florida, for a Writ of Error Coram Nobis, addressed to the judgment of con-

viction entered against him in said Court on April 23, 1937, whereby he was adjudged guilty of murder in the first degree and sentenced to be electrocuted (R. 1).

The Petition charges that the testimony given by petitioner's co-defendant, James Baker, a witness for the State of Florida, was false and that petitioner's conviction was based primarily upon such false testimony.

The Supreme Court of Florida denied petitioner's application (R. 31), and this Court granted Certiorari (R. 32).

Among other things the Supreme Court of Florida held in its order denying petitioner's application, that the Writ of Error Coram Nobis would not lie because of false testimony given at the trial by an important witness.

The Writ of Error Coram Nobis is a common law writ and is no longer in use in some jurisdictions:

> "At common law a writ of error coram vobis brought before the court certain mistakes of fact not put in issue or passed upon, such as the death of a party, coverture, infancy, error in process or mistake of the Clerk. This writ is no longer in use, but its objects are attained by motion. *Pickett* vs. *Lergerwood*, 7 Pet. 142, 147."
>
> *Wetmore* vs. *Karrick*, 205 U. S. 141, text 151.

However, this writ is still in use and recognized in the State of Florida. The Supreme Court of Florida has had occasion to set forth in a number of cases the instances in which the writ was applicable. That Court has held that the writ will not lie in a criminal case where the conviction was had upon perjured testimony:

Jones vs. *State*, 130 Fla. 645, 178 So. 404.

Skipper vs. *State*, 127 Fla. 553, 173 So. 692.

Lamb vs. *State*, 91 Fla. 396, 107 So. 535.

Lamb vs. *Harrison*, 91 Fla. 927, 108 So. 671.

Jennings vs. *Pope*, 101 Fla. 1476, 136 So. 471.

Pike vs. *State*, 103 Fla. 594, 139 So. 196.

This holding is not peculiar to the Supreme Court of Florida but is in harmony with the decisions of courts of other states of the Union:

State vs. *Asbell*, 62 Kan. 209, 61 Pac. 690.

State, ex rel., Davis vs. *Superior Court and Pierce County*, 46 Pac. 399, 15 Wash. 339.

Beard vs. *State*, 99 S. W. 837, 81 Ark. 515.

People vs. *Mooney*, 174 Pac. 325, 178 Cal. 525.

It has also been held by a number of State Courts that this writ will not lie to obtain a new trial upon assertions of newly discovered evidence:

Howard vs. *State*, 24 S. W. 8, 58 Ark. 229.

Humphreys vs. *State*, 224 P. 937, 129 Wash. 309, 33 A. L. R. 78, and notes.

Dobbs vs. *State*, 65 P. 658, 63 Kan. 321.

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People vs. *Drysch*, 143 N. E. 100, 311 Ill. 342.

Sease vs. *State*, 247 S. W. 1036, 157 Ark. 217.

The Supreme Court of Florida has further held that the writ will not reach facts actually determined in the original proceeding:

Lamb vs. *State*, 91 Fla. 396, 107 So. 535.

Nor will it lie because the Prosecuting Attorney calls for the State one who is under agreement to be exonerated in the event of a conviction of a defendant:

Pike vs. *State*, 139 So. 196, 103 Fla. 594.

It is true that the narrow scope of the writ at common law has been broadened in those states which still permit its use, and it has been held that the writ will now lie in cases where the accused, through well grounded fear of mob violence, has been forced to enter a plea of guilty to a criminal charge:

State vs. *Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838.

And it has been granted where the accused was forced to enter a plea of guilty because of fear that he would be killed if he did not do so:

Nickels vs. *State*, 98 So. 502, 86 Fla. 208.

Nickels vs. *State*, 99 So. 121, 86 Fla. 208.

And where it is shown that the defendant was insane at the time of his conviction the writ will lie:

Hawie vs. *State*, 83 So. 158, 121 Miss. 197, 10 A. L. R. 205, and note.

Hydrick vs. *State*, 148 S. W. 541, 104 Ark. 43.

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Linton vs. *State*, 81 S. W. 608, 72 Ark. 532.

Gibson vs. *Pollock*, 166 S. W. 874, 179 Mo. App. 188.

Adler vs. *State*, 35 Ark. 517.

Johnson vs. *State*, 133 S. W. 596, 97 Ark. 131.

It is not a writ of right but may be granted in the exercise of sound judicial discretion, and will not be granted unless it be duly shown that a fact existed at the trial that if then known to the Court would have prevented the judgment that was rendered, and in order to authorize the granting of the writ such facts must appear with reasonable certainty:

Ernst vs. *Wisconsin*, 179 Wis. 646, 192 N. W. 65, 30 A. L. R. 681, also

Lamb vs. *State*, 107 So. 535, 91 Fla. 396.

The Supreme Court of Florida in the case of *Washington* vs. *State*, 110 So. 259, 92 Fla. 740, in discussing the writ held that an Appellate Court should not grant permission to apply to a trial court for a writ of error coram nobis except upon a proper and adequate showing of essential facts duly made by competent and adequate legal evidence.

The case of *Mooney* vs. *Holohan* reported in 294 U. S. page 103, 79 L. ed. 791, seems to be very similar to the case now before this Court.

In the Mooney case a motion was filed in the Supreme Court of the United States for leave to file a petition

for an original writ of habeas corpus. The petitioner, Mooney, alleged that he was unlawfully restrained of his liberty by the State of California under a commitment pursuant to a conviction of murder in the first degree. The petition charged that the State of California held him in custody without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that the sole basis of his conviction was perjured testimony which was knowingly used by the prosecuting authorities in order to obtain his conviction.

As we believe the decision of this Court in the Mooney case is directly in point and that the action of the Court in that case should control in the case at bar, we take the liberty of quoting somewhat at length from the opinion of this Court in the Mooney case:

> "The decisions of the Supreme Court of California in relation to petitioner's conviction have dealt with the questions presented to that Court within the limitations of particular appellate procedure. When there was submitted to that Court the consent of the Attorney General to the reversal of the judgment against petitioner and to the granting of a new trial the Court pointed out that no motion had been made by the defendant and that his appeal was awaiting hearing. *People* vs. *Mooney*, 175 Cal. 666, 166 P. 999. When, again in advance of the hearing of his appeal, the defendant made his motion solely upon the ground of the Attorney General's consent, the Court held that its jurisdiction on appeal was limited to a determination whether there had been any error of law in the proceedings of the trial court and that the Court was confined to the record sent to it by the court below. *People* vs. *Mooney*, 176 Cal. 105, 167 P. 696. On the appeal, the Court, thus dealing

with the record before it, found that the verdict was supported by the testimony presented and that no ground appeared for reversal. *People* vs. *Mooney*, 177 Cal. 642, 171 P. 690. When, later, the defendant moved to set aside the judgment, and sought a certificate of probable cause on his appeal from an order denying his motion, the Court held that the general averments against the fairness of the trial were insufficient, but the Court did not place its denial of the application entirely upon that ground. The Court concluded that the proceeding by way of motion to set aside the judgment after it had become final and a motion for a new trial had been denied, and the time therefor had expired, was 'in the nature of an application for a writ of coram nobis, at common law.' The Court thought that such a writ did not lie to correct any error in the judgment of the Court nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. The Court, adopting the opinion of the court below, concluded that the judgment could not be set aside because it was predicated upon perjured testimony or because material evidence was concealed or suppressed; that the fraud in such a case was not such fraud as was 'extrinsic to the record,' and that it was only in cases of extrinsic fraud that the relief sought could be had. It was apparently in relation to such an application that the Court said that the injured party was 'without remedy.' *People* vs. *Mooney*, 178 Cal. 525, 174 P. 325. And it was with respect to that proceeding that the writ of certiorari was denied by this Court. *Mooney* vs. *California*, 248 U. S. 579, 63 L. ed. 430, 39 S. Ct. 21."

The Supreme Court of California treated Mooney's motion to set aside the judgment as if it were an application for a writ of error coram nobis, and held that such writ would not lie to correct any error in the judgment

of the trial court or put in issue any fact directly passed upon by that court.

In the case at bar the petitioner alleged in his application, filed in the Supreme Court of Florida, that he was convicted on perjured testimony.

We believe, therefore, that the action of the Supreme Court of Florida in denying the application was in accord with the opinion of this Court in the Mooney case and should be affirmed on authority of that case.

The Supreme Court of Florida has fully discussed the office of this extraordinary writ in the opinions herein cited, and have fixed precise limits within which it will be allowed in Florida, and has definitely set forth the requirements that must be met before it will issue and the procedure to be followed. In the instant case that court has found and determined that those requirements have not been met.

In the case of *Chesser* vs. *State of Florida*, 109 So. 906, the Supreme Court of Florida said:

> "The above-stated rule appears to have been uniformly adhered to by the courts of England, and also by the courts of the several states of the United States, where this extraordinary writ has been held to be an available remedy in proper cases, as is held in this state. The application of the writ for the purpose of obtaining redress in those cases where it was and is intended to apply is wise and salutary, but its scope cannot be extended without grave danger of its becoming a menace to the enforcement of the law, an ever ready barrier for the obstruction of justice and the vehicle for the escape of the guilty. The courts and the lawmakers of the country should therefore carefully guard the extent of its application

and confine it to those well-fixed purposes for which it was originally intended, and beyond which the courts and lawmakers in the past have not allowed its use."

A State is and should be free to regulate the procedure of its own courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental:

Brown vs. *Mississippi*, 297 U. S. 278-287, 80 L. ed. 682.

No fundamental right of the petitioner was violated by the refusal of the Florida Court to extend the application of this discretionary writ to cases in which it was never intended to apply.

The application, and exhibits thereto, filed in the Supreme Court of Florida by the petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the equal protection of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Petitioner apparently attempts to show that he has been denied the equal protection of law by the State of Florida by alleging in effect that he was convicted on testimony known by the Prosecuting Attorney to have been false. He further contends that the Supreme Court of Florida had applied a different rule in his case from the rule announced by that court in the case of *Washington* vs. *State*, 110 So. 259, 92 Fla. 740.

The purpose of the Thirteenth and Fourteenth Amendments was to elevate the colored race and place negroes on the same plane of equality with white persons so far as their civil and political rights were concerned.

The Fourteenth Amendment was adopted for the purpose of prohibiting any state from discriminating against any negro by reason of his race or color. The petitioner in this case is a white man.

We do not admit petitioner's allegation that the Supreme Court of Florida has adopted a rule in his case contrary to its previous decision. However, if this were true, it constitutes no action prohibited by the Constitution of the United States for it places petitioner in no different position than any other litigant.

The same is true as to his allegation with reference to the action of the prosecuting attorney. As was said

by the Circuit Court of Appeals for the Ninth Circuit in a case involving an alleged conspiracy brought against the Prosecuting Attorney, Deputy Prosecuting Attorney, and Judge, charging that they conspired to deprive a lawyer of his right to practice law:

> "No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard than any other individual in the state, namely, the hazard of being prosecuted for a crime and convicted by false testimony, and if the prosecuting officer of the county were sufficiently corrupt to use his high office for the purpose of convicting innocent people by perjured testimony, all the citizens within his jurisdiction would be subject to the same hazard."
>
> *Mitchell* vs. *Greenough*, 100 F. 2d 184.

Further in the same opinion the Court said:

> "The prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action."
>
> *Mitchell* vs. *Greenough*, supra.

The Supreme Court of the United States in discussing the purpose of and underlying reasons for the adoption of the Fourteenth Amendment to the Constitution of the United States said:

> "This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, as we said in the Slaughter-House cases, 16 Wall., 36, 21 L. ed., 394, cannot be understood without keeping in view

the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some states, laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the 14th Amendment was framed and adopted."

Strauder vs. *West Virginia*, 25 L. ed. 664.

See also *Barbin* vs. *Connally*, 113 U. S. 27.

The equal protection amendment cannot be said to apply to petitioner's case, as it is not shown that the State of Florida has accorded him any other or different treatment than is accorded any other citizen of the State under like circumstances.

The application, and exhibits thereto, filed in the Supreme Court of Florida by the petitioner for leave to apply for a Writ of Error Coram Nobis, failed to affirmatively show any denial to him by the State of Florida of the due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Petitioner further alleges in his application filed in the Supreme Court of Florida; that he has been denied due process of law, in that he was convicted on the testimony of two co-defendants, Alvin Tyler and James Baker; that their testimony was false and that they were coerced, intimidated, beaten, and threatened with violence in order to compel them to give testimony against petitioner, and further, for the reason that prosecuting attorney, in order to induce the witness James Baker to testify against the petitioner, promised the said James Baker that he would not receive the death penalty.

The application of petitioner is not self-proving, and we must, therefore, look to the affidavits attached to such application and made a part thereof, in order to determine whether the allegations of petitioner are substantiated.

The petitioner was convicted in this case on April 5, 1937 (R. 1). At that trial the co-defendant James Baker testified as a witness for the State. Four years later he attempts to repudiate the testimony he gave at that trial by means of his affidavits attached to petitioner's application (R. 6 to 16 & 21).

At this point we would like to call the Court's attention to the case of U. S. ex rel., *Lesser* vs. *People of New York*, reported in 34 Fed. Sup. page 730. In this case an

application was made to the United States District Court for the Western District of New York for a writ of habeas corpus. The application was based on the ground that the conviction was based on false and perjured testimony. Various affidavits were submitted in support of the application, among them affidavits to the effect that the complainant had stated that he was forced by the police to bring the charge of kidnapping against the relator and that the relator was not guilty of the offense.

As was stated by the Court in that case:

> "Admissions of this type are to be scrutinized and weighed with great caution."

The first affidavit of James Baker (R. 6) appears to have been made at the State Prison, Raiford, Florida, between 5:00 and 6:00 o'clock P. M. on April 7, 1941. In the narrative part of this affidavit Baker states that after the killing of Mr. and Mrs. Surrency, that he and Alvin Tyler, the man who did the actual killing, agreed between them while they were in "Cracker Swamp" in Duval County, Florida, that they would lay the blame of the planning of the robbery of the Surreneys on Clyde Hysler, because they had had considerable liquor dealings with him and knew him well, and because the Hyslers bore a bad reputation in Duval County and Clyde Hysler's father had plenty of money and they thought he and his other relatives would be able to get Clyde Hysler out of the trouble, and that by doing this James Baker and Alvin Tyler would escape the death penalty.

He further states in this affidavit that Clyde Hysler was not implicated in the planning of the robbery and had nothing to do with the killing of Mr. and Mrs. Surrency, but that one, Joe Peterson, was the man who

planned the robbery and hired James Baker and Alvin Tyler to perform the robbery.

It is significant to note the phraseology used in this affidavit. Baker says that he and Tyler agreed to lay the blame of the *planning* of the robbery on Clyde Hysler for the above reasons. He further says that Clyde Hysler was not *implicated* in the *planning* of the robbery and had nothing to do with the *killing* of Mr. and Mrs. Surrency. Nowhere in this affidavit or in any of the other affidavits filed with petitioner's application does James Baker deny the truth of the *facts* testfied to by him at the trial. As the testimony given at the trial of this case has not been incorporated in the printed record, references to such testimony are to the original page numbers of the transcript on file in this Court.

Baker testified at the trial that Clyde Hysler carried him in an automobile out to the vicinity where the robbery was to take place several days prior to the murder and showed him the roads in that section and where Clyde Hysler would meet Baker and Tyler after the holdup, and that Clyde Hysler did in fact meet Baker and Tyler in that vicinity immediately after the murder of Mr. and Mrs. Surrency and carried them in his car to a swamp where they got out, Hysler advising them that he would come back for them later that day (1030-1065).

This testimony was also corroborated by the testimony of Alvin Tyler (911-927).

Baker does not in any of his affidavits attached to the petitioner's application, state that these facts as testified to by him and Alvin Tyler were not true. By reading the testimony of the witness Baker and comparing it with the affidavit which he made on April 7, 1941, (R. 6),

it will be readily seen that in this affidavit he merely substitutes the name of Joe Peterson for that of Clyde Hysler.

In this first affidavit (R. 9), it appears as follows:

"Q. You are making these statements and this affidavit of your own free will and accord without any hope or reward or fear of punishment, and without any intimidation and realizing that you are likely to die next week?"

"A. Yes, sir, but that is the truth."

"Q. Do you say that all the statements you have made in here is the truth and nothing but the truth?"

"A. Yes, sir."

Notwithstanding this statement by Baker that the truth was contained in that affidavit, it was found necessary to interview him again on the following day, April 8, 1941, at which time Baker appears to have made another statement to counsel for petitioner at the State Penitentiary between 6:00 and 7:00 o'clock P. M. In this statement James Baker, instead of narrating his story, was specifically interrogated, and in this statement appears for the first time any indication of any mistreatment of this witness by any officers.

Notwithstanding the fact that the petitioner's application (R. 5, par. 8) states that the affidavits made by Baker were made freely and voluntarily and without any *suggesting* or *prompting*, we find (R. 11), the alleged mistreatment of Baker introduced in this manner:

"Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?"

"A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hulbert did talk to me, that he would get me life imprisonment—life instead of the chair."

And then Baker states that John W. Harrell, the State's Attorney, told him that he would help get him out in three years and that he, Baker, wouldn't burn. Baker then states, according to this affidavit, that the officers beat and mistreated him, and contrary to the statement made by him in the first affidavit as to his reasons for laying the blame of the murder on Clyde Hysler, he says in this second affidavit (R. 12), that he did so because he was beaten and mistreated:

"Q. And if it hadn't been for the beatings and threats and the promises to get you out of here in three years as you have stated above would you have implicated Mr. Hysler in the case at all?"

"A. No; sir, cause I told them I didn't no anything about it; and another thing, between Mr. Hysler's first trial and last one, Mr. Harrell came down to the County Jail after I was allowed to see people, I said, don't you know that if you burn Mr. Hysler you will have to burn me too, and he said he could burn the whole Hysler family and don't burn me cause he and Mr. Sidney Hulbert, Mr. Carson and Mr. Cannon and some more officers was going to run the county as long as they were running it."

Now which of these affidavits is true?

It appears that they both cannot speak the truth.

It appears that again on this same day between 8:30 and 9:00 o'clock P. M. the third affidavit was made by James Baker at the State Penitentiary at Raiford, Flor-

ida, and in this affidavit (R. 16), for the first time appears a charge of improper conduct on the part of the Prosecuting Attorney.

Baker says in this third affidavit:

"Q. Baker do you know whether or not Mr. Harrell knew if you was beat up to make you testify?"

"A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

In this affidavit or statement this direct question was asked Baker:

"Q. As a matter of fact, Hysler was not mixed in it but it was Joe Peterson—?"

and Baker made no direct answer to this question but began talking about something else (R. 15).

It will be noted that in the other affidavits Baker had said that Hysler was not *implicated* in the *planning* of the robbery and had nothing to do with the *killing* of the Surrencys, and further that he was not *responsible* for the attempted robbery, but when he was asked the direct question of whether Hysler was "mixed in it" he failed to answer.

In considering these affidavits of Baker it should be borne in mind that they were made four years after the trial of petitioner in which Baker testified as a witness. They attempt to lay the blame for the killing of the Surrencys on one, Joe Peterson, a man whose lips have now been sealed by death (R. 18).

It should further be borne in mind that the witness, Alvin Tyler, who testified for the State at petitioner's

trial and who is a co-defendant, has escaped and the witness Baker knows that he is not available to contradict Baker's statements (R. 9).

The affidavits of Baker, to the petition attached, cannot be reconciled one with the other. The matters alleged in the first affidavit stand in defiance to the alleged truth of the allegations contained in the second affidavit. That portion of Baker's affidavits that is in question and answer form, reveals that his answers were in reply to direct, leading, and suggestive questions propounded to him, the form and structure of such questions being at variance with the most elementary rules of trial procedure. It is respectfully submitted, therefore, that the affidavits of Baker are not competent and adequate legal evidence of any facts.

In an effort to corroborate statements made in these affidavits by Baker, there are attached to the Petitioner's application affidavits of one Ed Mosley (R. 16), A. J. Mooney (R. 17), Ruby Crews (R. 18), Rudolph J. Dowling (R. 19), H. L. Anderson and W. J. Sears, Jr., (R. 20).

The affidavit of Ed Mosley (R. 16) attempts to corroborate the affidavits of the witness James Baker in his statement that Joe Peterson and not Clyde Hysler was implicated in the attempted robbery and murder of Mr. and Mrs. Surrency. This affidavit states that Joe Peterson told affiant about some man who went to get a bunch of Fruit Growers Express checks cashed, and in effect it would be an easy matter to rob him. Nowhere in this affidavit is it shown that the man Joe Peterson had reference to was Mr. Surrency. It is merely a general statement purporting to have been made by Joe Peterson to affiant in an endeavor to get affiant to hold up some unknown man.

There was also submitted with petitioner's application filed in the Supreme Court of Florida an affidavit of one A. J. Mooney (R. 17), in which he states that one Rudolph Dowling told him, affiant, that that negro Baker said for him, Peterson, to bring him something; that he, Baker, was keeping his mouth shut. This is evidently intended to imply that Baker was keeping his mouth shut about Peterson's supposed connection with the attempted robbery and murder of the Surrencys. However, neither in this affidavit nor in the affidavit of Rudolph Dowling (R. 19), does this positively appear to have been what Baker had in mind. It will be recalled that Baker, in his affidavit of April 7, 1941 (R. 7), stated that he had liquor dealings with Joe Peterson, and we submit that it is just as reasonable and probable to believe that Baker meant to convey to Joe Peterson his intention to keep his mouth shut concerning Peterson's liquor dealings.

There also appears in the affidavit of A. J. Mooney (R. 18), a statement purporting to have been made by Joe Peterson to the effect that he, Joe Peterson, was the cause of "all of it." No doubt this is construed by petitioner to mean that Joe Peterson stated that he was the cause of the death of Mr. and Mrs. Surrency in corroboration of the statements made by James Baker.

Ruby Crews stated in her affidavit (R. 18), that Joe Peterson had told her that he was responsible for the whole thing, speaking about the death of Mr. and Mrs. Surrency. These statements were made to her, according to her affidavit, at different times between the death of the Surrencys and Christmas 1939.

Joe Peterson was a witness for the State of Florida at the trial of the petitioner, and according to his testimony, he went into Jacksonville to a bank with Mr. Surrency on the morning of the day that Surrency was killed (617) and that he, about 9:30 or 9:45 that morning, returnd to his home with Mr. and Mrs. Surrency (627); that he remained at his home and Mr. and Mrs. Surrency left (627-628); that shortly thereafter one Wiley Prescott came to his house and said, "Come on you want to see a bad looking sight" (629), and that he, Peterson, then went down to the place where Mr. and Mrs. Surrency had been shot (631-636).

The statements purporting to have been made by Joe Peterson to affiants A. J. Mooney and Ruby Crews concerning his sense of responsibility for the death of Mr. and Mrs. Surrency may mean any one of a great number of things. He might have meant that he could have traveled home a different route from Jacksonville on that particular morning and Mr. and Mrs. Surreney would not have been killed, or he could have meant that had they made their visit to Jacksonville at a different hour of the day they might not have met these two negroes, or if they had gone to Mr. Surrency's home on their return from Jacksonville before first going by Mr. Peterson's home they might not have met these two negroes. There is certainly no direct and positive contention in any of these affidavits sufficient to impeach the positive testimony of the witnesses who testified at the trial of petitioner.

The record does not reveal whether or not the affiants Ed Mosley, A. J. Mooney, Ruby Crews, and Rudolph J. Dowling are close relatives of petitioner. It is also to be noted that neither of these affiants offer any reason

or explanation for their having remained *silent* during the passing of years and until after the death of Joe Peterson.

Petitioner also submits an affidavit of the Honorable W. J. Sears, Jr., and the Honorable H. L. Anderson, the attorneys who represented him at his trial (R. 20), whom the Supreme Court of Florida saw fit to refer to (R. 32) in its Order denying petitioner's application, as able, diligent, and faithful counsel. These attorneys state in their affidavit, that they questioned the witnesses James Baker and Alvin Tyler at great length prior to petitioner's trial. On this occasion the attorney for James Baker and the attorney for Alvin Tyler were present, and Baker and Tyler, in the presence of their attorneys and the attorneys for Clyde Hysler, denied that any one was involved in the case other than the defendants named in the indictment; they also denied that any statements previously made by them to law-enforcing officers were made under duress or with any hope or expectation of reward.

There certainly was no occasion for Baker to withhold the truth from his own attorney and if in truth he had been subjected to mistreatment, or extended any promise or hope of reward, he would have then and there made such facts known to his own counsel. It certainly could not in fact be contended that Baker was on that occasion under duress or fear.

There is nothing in the affidavit made by the Honorable W. J. Sears, Jr., and the Honorable H. L. Anderson to indicate that they did not believe and have every reason to believe the testimony given at the trial by these witnesses. It must be presumed that such able

counsel had conferred at length with their client as well as with these two witnesses. They, therefore, knew at the time of the trial whether the testimony of these two witnesses was in accord with the explanation given by the petitioner. The testimony given by these two witnesses, therefore, does not appear to have been any surprise to petitioner, and it certainly cannot be said that such testimony is newly discovered.

One of the grounds assigned by the Supreme Court of Florida as a basis for its Order denying petitioner's application was that the record of the Judgment of Conviction of the petitioner shows ample evidence to support his conviction without the aid of the testimony of the witness James Baker. Out of an abundance of precaution the Supreme Court of Florida apparently discarded from its mind all of the testimony of the witness James Baker and found ample evidence in that record to sustain petitioner's conviction.

Respondent concedes that a conviction of a criminal offense which rests solely upon a confession shown to have been extorted by officers of the State by brutality and violence is inconsistent with due process of law as required by the Fourteenth Amendment to the Constitution of the United Sates:

Brown vs. *Mississippi*, 297 U. S. 278, 80 L. ed. 682.

And that it is also inconsistent with due process for a State to contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the Court and Jury by the presentation of testimony known to be perjured.

Mooney vs. *Holohan*, 294, U. S. 103, 79 L. ed. 791,

but the due process of law clause of the Fourteenth Amendment was never intended to deprive Courts generally of the power to hear and determine issues of fact and in doing so to decide which evidence is true and which evidence is false:

United States vs. *Throckmorton*, 98 U. S. 61, 25, L. ed. 93;

Springstein vs. *Sanders*, 182 Iowa, 658, 164 N. W. 622, L. R. A. 1918F, 1076;

Asbell vs. *State*, 62 Kan. 209, 61 P. 690;

Beard vs. *State*, 81 Ark. 515, 99 S. W. 837;

State ex rel., Davis vs. *Superior Ct.*, 15 Wash. 339, 46 P. 399;

Howard vs. *State*, 58 Ark. 229, 24 S. W. 8;

Mooney vs. *Holohan*, 294 U. S. 103-115, 79 L. ed. 791.

There is no question in this case of a confession extorted by officers of the State, and petitioner has fallen far short of meeting the requirements indicated by the statement of this Court in the case of *Mooney* vs. *Holohan*, supra.

The testimony given at petitioner's trial by the witnesses other than James Baker fits in and is consistent with the testimony given by him, Baker, but it is altogether inconsistent with the statements made by James Baker in the affidavits attached to the petitioner's application filed in the Supreme Court of Florida, and the statements made in the other affidavits attached to this application are entirely inconsistent with the evidence given at petitioner's trial.

In support of the findings of the Supreme Court of Florida that the evidence was amply sufficient to sustain

petitioner's conviction without the aid of the testimony of James Baker, we would like to discuss that evidence briefly at this point. As we have previously stated, references herein to testimony given at the trial of petitioner are to page numbers of the original transcript of record of the Judgment of Conviction in that case, as this testimony has not been incorporated in the printed record before this Court.

The petitioner, in his direct examination at the trial, stated that he saw James Baker on November 20, 1936, and was asked by Baker for a job hauling whiskey (1697-98); that he took a load of moonshine liquor from Jacksonville to Orlando the following Sunday night November 22, getting back early Tuesday morning, November 24, (1702); that he was due to take another load to Palatka on Wednesday, November 25, and went to town Tuesday afternoon to arrange with someone to take the load (1702-03); that he saw Baker with whom was Tyler and arranged for Baker to take the whiskey (1703-04); that he then went to Robert E. Lee High School to see Miss Newsom, a teacher, about borrowing her car (1705-06) and that night arranged with her to take it the next morning (1709-10); that Wednesday morning he met Baker and Tyler and took them to the high school where he had Tyler get Miss Newsom's car (1712); that he then had Baker drive the car with Tyler and gave him some money to get gasoline and told Baker to meet him at Lenox and Edgewood (1713); that he waited at that corner from approximately 9 o'clock to 10:30 o'clock A. M. and then drove to Bud Gardner's house (1714-15); that from then until the middle of the afternoon he was with Bud (1718-25). On cross examination he stated that while he was waiting at Lenox and Edgewood for the

negroes he saw several people, naming them (1811-12), but none of these people were put on the stand to corroborate his statement.

The testimony of Tyler, a witness for the State, was like that of the petitioner in certain parts. After being warned by the trial judge of his constitutional rights (881-83), he stated that he had known the petitioner only since November 24, 1936, (884-85, 889) at which time he was with Baker and got in petitioner's car (890-92); that petitioner said he would see them the next morning (902); that the next morning, Wednesday, November 25, the petitioner came for them and took them to the high school where he, Tyler, got Miss Newsom's car (903-04).

Except for the foregoing testimony the statements of petitioner and Tyler do not agree. Tyler stated that the petitioner took Baker and himself out Kings Road on the afternoon of November 24, discussed the proposed robbery of Mr. Surrency and showed them the different roads (894-95); that while they were driving around they met two ladies in a car at a cross road (898-99); that petitioner showed them a gun which they could use (907-08); that next morning after getting Miss Newsom's car he went in petitioner's car with petitioner and Baker followed in Miss Newsom's car out to Kings Road (910) where petitioner showed them where and how to block Mr. Surrency's car (911) and where he would wait for them (912); that petitioner then gave him the gun fully loaded (912); and that he and Baker left in Miss Newsom's car (916); that after the attempted robbery when he fired all cartridges in the gun, Baker drove the car up a dirt road which ran out and the two of them ran across a field (923) until they saw petitioner in his car and got in it (925); that they were then taken to Cracker

Swamp where petitioner left them saying he would come back at night time for them (927); that after remaining in the swamp for a while during which he left his overalls, the two of them left the swamp and went on to town (934, 939-42); that he pawned the pistol (947); and that he definitely identified the revolver in court as the one used by him and given to him by petitioner (955-57).

The testimony of James Baker, which now more than four years after the trial he attempts to repudiate in part, is substantially like that of Tyler (1027-1178).

There is a great deal of testimony to corroborate that of Tyler as to the points on which he and the petitioner did not agree. The revolver which Tyler identified in Court as the murder weapon was shown to have been owned by Joe Bird who pawned it with Ed Bazar (1260). Bazar agreed to let James H. Hysler, father of the petitioner, have it (1272). W. E. Traub, who worked for Bazar, said he turned it over to James H. Hysler (1280-81). Richard Gore, a policeman, said he had seen the revolver in Bazar's place (1287) and that later in October, 1936, he saw it in the hands of Clyde Hysler (1289-90). Girvis Stephenson confirmed the statement of Gore in that he said he was present at the time Gore stated Clyde Hysler showed a revolver but could not identify it as the one in court (1373-74). A Mrs. Bowling, who had danced and gone around with Clyde Hysler, said she saw a revolver like the one in court in Hysler's pocket two or three times in September, 1936, though she could not identify it as the revolver in court (1303-06). A fire-arms expert from the Federal Bureau of Investigation in Washington identified the bullet which had been taken from the hip of Mrs. Surrency (600, 751) as one

which had been fired from the revolver in the court room (1225) and his statement confirmed that of Tyler who testified he had fired it at the holdup.

Mrs. Elizabeth Crawford stated that she was driving the car of Mrs. Bessie Wainwright on Tuesday morning November 24, 1936, and that about 11:45 A. M. she met a car in which Hysler was riding on the front seat and a negro whom she identified as Tyler driving and another negro whom she identified as Baker sitting in the back seat; that this meeting was at the corner of West Fifth Street and Huron; that Tyler honked his horn and they waited for him to turn (1343-45). This was confirmed by Mrs. Wainwright who stated she was sitting in the front seat with Mrs. Crawford (1321-25). A workman for the Atlantic Coast Line Railroad Company, J. C. Peacock, said he saw petitioner with two negroes driving on St. Clair Street, one block from Huron Street, shortly after 11:30 A. M. Tuesday morning, November 24, 1936, (1357). He could not identify the negroes but states that one was driving the car with Hysler sitting beside him and the other was in the back seat (1359).

Miss Laura Newsom confirmed the statement of petitioner that he came on Tuesday afternoon to the high school to borrow her car (1438) and said that he had asked to borrow it only for a short while (1439-40); that when she wanted the car about 10:30 A. M. Wednesday morning it was gone and she reported it stolen (1443); that during the morning while still at school she received a note: "Report your car stolen. It is all right" (1446). Bud Gardner stated that he took the note from petitioner to Miss Newsom that morning (1599-1602) and petitioner himself admitted that he wrote such a note and sent it by Bud (1719-20), though upon cross examination he

could give no satisfactory reason why he did not tell Miss Newsom he had turned the car over to the negroes (1788-90, 1803-06).

Mrs. T. J. Baxter testified that she was driving a car in which was seated Mrs. Laura Green and Miss Barbara Atkinson on the morning of Wednesday, November 25, 1936, shortly before 10:00 A. M. when she passed the Surrency car blocked by a car used by two negroes later identified by her as Baker and Tyler (810-15); that after she had passed the two cars and stopped at Kings Road to let Miss Atkinson out she heard shooting (816); that she then drove with the two women to St. Clair Street where Miss Atkinson got out in front of the house of her grandmother (818); that while waiting for Miss Atkinson to return she saw the black negro running on St. Clair street (821) where he got in a black, new looking car which left at once (822-23). Similar testimony was given by Mrs. Green (761-809) who said that she turned in the seat at the first shot and saw the light colored negro (Tyler) still shooting (773); that when their car reached the front of the house of Miss Atkinson's grandmother she saw the black negro (Baker) running and get in a new Plymouth or Pontiac sedan which left at once (777-78); that she later identified a car at the police station as the one into which she had seen the negro get (798-99, 807-08). Miss Atkinson testified to about the same facts as Mrs. Green except that she said she did not see the negro get in the escape car because she was walking over to her mother's house (858-78).

The foregoing excerpts from the evidence given at the trial definitely show a connection of the petitioner with

the crime even without the testimony of either Tyler or Baker. There is no showing that Tyler has ever repudiated his testimony and in all points except the actual conversation when the robbery was planned he was corroborated by unimpeached witnesses.

CONCLUSION

It is significant to note that the affidavits made by James Baker in which he attempts to exonerate petitioner now more than four years after his testimony was given at the trial, were not made until after his own conviction was affirmed by the Supreme Court of Florida (*Baker* vs *State*, 188 So. 634). It appears all through his affidavits that he is fully cognizant of the fact that the only chance he has of escaping the death penalty is by some means for the petitioner, Clyde Hysler, to escape that penalty, as these affidavits show that the negro is convinced that if Clyde Hysler is electrocuted he, Baker, will also suffer the death penalty.

The conflicting affidavits upon which the petitioner's application was predicated were certainly insufficient to impeach the verity and finality of the judgment of the Circuit Court of Duval County, Florida, which was, on appeal, affirmed by the Supreme Court of the State of Florida.

We, therefore, submit that the record in this case fails utterly to show that the petitioner has been by the State of Florida denied equal protection or due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

It is, therefore, respectfully urged that the Order and Judgment of the Supreme Court of Florida be affirmed.

Respectfully submitted,

J Tom Watson,
Attorney General of Florida;

Joseph E. Gillen,
Assistant Attorney General of Florida;

Woodrow M. Melvin,
Special Assistant Attorney General of Florida,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 64

CLYDE HYSLER,

Petitioner,

vs.

STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

PETITION FOR REHEARING.

P. GUY CREWS,
CARLTON C. ARNOW,
Counsel for Petitioner.

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STATE OF FLORIDA.

PETITION FOR REHEARING.

Comes now the Petitioner, Clyde Hysler, by and through his undersigned Attorneys and humbly petitions the court and respectfully requests the court to grant a rehearing in the above styled cause and for grounds thereof, submits.

I.

In the opinion of the court wherein the court said:

> "* * * In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction. However, if Florida through her responsible officials knowingly used false testimony which was extorted from a witness 'by violence and torture', one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony * * *".

The court has inadvertently overlooked the fact that the evil is the same whether the responsible officials know that the testimony is false, or do not know that the testimony is false and that in the case of:

Chambers v. *State of Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716,

the responsible officials of the State of Florida believed the testimony of the witnesses to be true and that in the Petition filed in the Supreme Court of Florida for leave to proceed in the lower court to file a petition for writ of error *coram nobis*, it was not charged that the responsible officials knew that the testimony of the witnesses was false. The sole charge being that the responsible officials by the third degree had forced witnesses to testify falsely.

II.

The court inadvertently overlooked the fact that in Florida it is not necessary that the responsible State officials know that the testimony obtained by violence and torture is false, if in truth and in fact testimony was obtained by the responsible State officials by force and violence and the conviction rests on such false testimony.

III.

The Court has inadvertently misconstrued the rules laid down by the Supreme Court of Florida in the case of:

McCall v. *State of Florida*, 1939, 136 Fla. 349-350, 186 So. 803.

wherein the Petition was not supported in any particular, except the affidavit of the Petitioner, which on the face of the Petition showed conclusively that the application was frivolous. The opinion of the Supreme Court pointed out that McCall presented no supporting affidavits; that his

affidavit was contrary to his testimony given at the trial and was contradictory to the testimony of other witnesses at the trial and that in said Petition McCall first claimed that he was innocent and as shown by the Petition filed in the Supreme Court of Florida there was no claim that the testimony of the other witnesses upon which his conviction in part rested was perjured testimony and obtained by force and violence, or the hope of reward, or that the conviction rested solely on his confession.

IV.

The Court has inadvertently overlooked the rules expressed by the Supreme Court of Florida in the case of:

Chambers v. *State of Florida*, 113 Fla. 786, 152 So. 437.

wherein the Supreme Court of Florida said:

> "* * * The petition for leave to file writ of error coram nobis presents allegations which, if true, would constitute ground for issuing the writ. It is not the province of this court to determine whether or not such allegations are true. The determination of such question may be had in the circuit court under issues duly made for that purpose.
>
> The Petition then sets forth that the facts which constitute the basis of the petition was unknown to the petitioners, or to their attorneys who represented them at the trial, or to the court at the time of the trials, verdicts, sentences, and judgments. These allegations are shown upon the face of the petition to be false, because certainly the petitioners knew on the date of the trial about all things which they alleged happened to them prior to the date of the trial * * *".

And further from the opinion:

> "* * * If the allegations of the petition are not true, they may be traversed in due course in the court below, and thereupon the issues as to the truth of such allegations may be judicially determined * * *".

V.

The Court has inadvertently misconstrued the duty of the Supreme Court of Florida where application is made to file a petition for writ of error *coram nobis* in the lower court when the Court said that the Supreme Court of Florida was under a grave responsibility, because of the non-review ability of the granting of such writs in the lower court, because by the terms of Chapter 19554 Laws of Florida 1939, Section 286, the State of Florida has the right to appeal from an order granting a new trial in a criminal case, the granting of a writ of error *coram nobis* being an order granting a new trial which act was passed after the decision was rendered in the case of:

Lamb v. *State of Florida*, 91 Fla. 396-409, 107 So. 535-540.

VI.

The Court has inadvertently overlooked the fact that the petition filed by the petitioner Hysler in the Supreme Court of Florida followed substantially the petitions in the case of:

Lamb v. *State of Florida*, 91 Fla. 396-409, 107 So. 535-540, and

Chambers v. *State of Florida*, 113 Fla. 786, 152 So. 437.

VII.

The Court inadvertently overlooked the rule of law in Florida which permitted the Supreme Court of Florida to only determine if the petition for leave to apply to the lower court for a writ of error *coram nobis* made out a prima facie showing, which if true would warrant the granting of a writ of error *coram nobis* and that the Supreme Court of Florida was without authority to determine the truth of the allegations of the application, but that a trial

of the truth of the allegations should be had before a jury and that in the cases of *Lamb* v. *State of Florida* and *Chambers* v. *State of Florida, supra,* application was granted to proceed in the lower court on petitions substantially the same as Hysler's petition and that the petition in the case of:

McCall v. *State of Florida,* 136 Fla. 349-350, 186 So. 803,

was in no wise similar to those in the cases of *Lamb* v. *State of Florida* and *Chambers* v. *State of Florida*, and it further inadvertently overlooked the fact that the petition in the cases of:

Skipper v. *Shoemaker,* 124 Fla. 384-405-408, 169 So. 58; and

Skipper v. *State of Florida,* 127 Fla. 553-554-555, 173 So. 692,

the Supreme Court of Florida denied the application because the application did not show the alleged false testimony was obtained by the responsible State officials by fear and violence, or the hope of reward.

VIII.

The Court has inadvertently overlooked the fact that the Supreme Court of Florida in deciding that the allegations of the petition and the supporting affidavits upon which Hysler based his application for leave to file a petition for writ of error *coram nobis* in the Circuit Court of Duval County, Florida, were not true, usurped the province of a trial jury contrary to the announced rule laid down by it in the case of:

Chambers v. *State of Florida,* 117 Fla. 642, 158 So. 153,

Wherein the court said:

"* * * In the instant case no issue of fact was made upon the allegations of the application. The ap-

plication for the writ was denied, the learned circuit judge delivering a lengthy opinion in which he summed up the evidence and stated his reaction to it and the conclusion he reached as to its probative force. In that action he undertook to take the part of a jury, assumed it function, and in effect to reverse the implied decision of this court as to the legal efficacy of the fact, assuming it to be proved in due course of a trial of the issue.

We are of the opinion therefore that the order denying the writ of error coram nobis was error, so the judgment is reversed, with direction to allow the writ and to proceed in accordance with the views expressed in the opinion. Reversed.

IX.

The Court inadvertently overlooked the fact that the allegations set forth in Hysler's application to apply to the Circuit Court of Duval County, Florida, for a writ of error *coram nobis* setting forth facts if true showed that he had been denied the equal protection of laws under the 14th Amendment to the Constitution of the United States, and as interpreted in the case of:

Chambers v. *State of Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716,

and that the denial to the petitioner Hysler to so proceed denied to him rights given to petitioner Lamb and Chambers in the cases of:

Lamb v. *State of Florida*, 91 Fla. 396-409, 107 So. 535-540,

and

Chambers v. *State of Florida*, 113 Fla. 786, 152 So. 437,

under circumstances similar to Hysler's.

X.

The Court inadvertently failed to consider the fact that when the Supreme Court of Florida wrote the opinion in the case of:

James Baker v. *State of Florida*, 137 Fla. 27, 188 So. 634.

Wherein the Supreme Court of Florida stated that the confession of Baker was freely and voluntarily given; that at said time Baker was still testifying under the expectation of escaping the electric chair, which was the hope of reward held out to him to get him to testify against Hysler, and further inadvertently overlooked the fact that in the case of:

Chambers v. *State of Florida*, 111 Fla. 707, 151 So. 499,

wherein the Supreme Court of Florida upheld the conviction on the trial in the lower court it said:

> * * * Nothing has been found in the transcript to raise the slightest doubt as to propriety of the convictions and sentences in this case, as to either of the condemned defendants.
>
> It is therefore considered, ordered, adjudged by this court that the judgments brought here on writ of error be, and the same are hereby affirmed as to each of the plaintiffs in error, Isiah (Izell) Chambers, Jack Williamson, Charlie Davis, and Walter Woodward (Woodard). Affirmed.

Nevertheless the Supreme Court of Florida in the case of:

Chambers v. *State of Florida*, 113 Fla. 786, 152 So. 437,

granted the application to proceed in the lower court for writ of error *coram nobis*, notwithstanding it had previously held the testimony sufficient to sustain the conviction.

XI.

As an appendix to this petition for rehearing we attach a certified copy of the application in the case of:

Chambers v. *State of Florida*, 113 Fla. 786, 152 So. 437, and

McCall v. *State of Florida*, 136 Fla. 349, 186 So. 803,

and also as a part of an appendix have set forth the petition in the case of:

Lamb v. *State of Florida*, 91 Fla. 396-409, 107 So. 535-540,

as found in Carson's Florida Common Law Pleadings 1st Ed. Pages 211-214.

P. Guy Crews,
Carlton C. Arnow,
Attorneys for Petitioner.

203 Realty Building,
Jacksonville, Florida.

Certificate.

I, P. Guy Crews, do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

P. Guy Crews,
Of Counsel for Petitioner.

P. 8

SUPREME COURT OF THE UNITED STATES.

No. 64.—October Term, 1941.

Clyde Hysler, Petitioner, vs. The State of Florida. } On Writ of Certiorari to the Supreme Court of the State of Florida.

[March 2, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

After the Supreme Court of Florida had affirmed his conviction for murder, the petitioner applied to that court for leave to ask the trial court to review the judgment of conviction. The basis of his application was the claim that the testimony of two witnesses implicating him was perjured, and that they had testified falsely against him because they were "coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated" by the police and were "promised immunity from the electric chair" by the district attorney. After twice considering the matter, the Supreme Court of Florida denied the application. 146 Fla. 593. We brought the case here, 313 U. S. 557, in view of our solicitude, especially where life is at stake, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment.

The guides for decision are clear. If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. *Mooney* v. *Holohan*, 294 U. S. 103. Equally offensive to the Constitutional guarantees of liberty are confessions wrung from an accused by overpowering his will, whether through physical violence or the more subtle forms of coercion commonly known as "the third degree". *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. —. In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction. However, if Florida through her responsible officials knowingly

used false testimony which was extorted from a witness "by violence and torture", one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony.

And so we come to the circumstances of this case.

On November 25, 1936, as a result of an attempted robbery, John H. Surrency and his wife Mayme Elizabeth were murdered. On December 16, 1936, Hysler was indicted for the murder of John Surrency; he was tried on January 21, 1937, was convicted on February 12, 1937, with recommendation of mercy, and was thereafter sentenced to imprisonment for life. On February 3, 1938, his sentence was affirmed by the Florida Supreme Court. 132 Fla. 200. The record in the case was more than 3000 pages. On January 15, 1937, Hysler together with two others, James Baker and Alvin Tyler, was indicted for the murder of Mrs. Surrency. A severance having been granted as to Tyler and Baker, Hysler was placed on trial on March 15, 1937, and on April 5 was found guilty without recommendation of mercy. On April 23, 1937, he was sentenced to death. On April 24 he sued out a writ of error to the state Supreme Court, which on February 3, 1938, sustained the sentence, and on June 3 denied a rehearing. The record on this second trial was some 2500 pages. 132 Fla. 309.

Surrency kept a restaurant near Jacksonville, and on the fatal day was returning from one of his regular and well-known trips to that city to get checks cashed. Hysler had known Baker in connection with Hysler's illicit whiskey business. Baker and Tyler were friends. The principal evidence in both trials against Hysler was their testimony. They testified with circumstantiality that Hysler induced them to hold up Surrency, furnished them a car, a pistol, and some whiskey, gave them detailed instructions for carrying out the plan, and by prearrangement was in the vicinity of the place of its execution. While their testimony doubtless was the foundation of Hysler's convictions, the testimony both of numerous witnesses and Hysler himself sheds much confirming light on the story told by Baker and Tyler. A careful concurring opinion affirming the conviction now challenged concluded thus: "From the evidence it is difficult to see or understand how the jury in the Court below could have rendered a verdict other than guilty. We have thoroughly considered each assignment and failed to find error in the trial of the cause in the lower court." 132 Fla. 209, 235.

Accordingly, the date for the execution was set by the Governor of Florida for the week of February 20, 1939. In the meantime, however, an application for a writ of *habeas corpus* by Hysler was made to the Supreme Court of Florida, partly on the ground of insanity. This was denied by that Court on February 20, 1939. 136 Fla. 563. Tyler broke jail and has apparently remained a fugitive from justice. Baker was tried after Hysler, was convicted of murder in the first degree, and sentenced to death. His conviction was affirmed by the Florida Supreme Court on March 14, 1939, and a rehearing denied on April 11, 1939. 137 Fla. 27.

We have now reached the final chapter of this unedifying story in the administration of criminal justice. On April 10, 1941, more than four years after Hysler's conviction for the murder of Mrs. Surrency, he petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida (the court before which he was originally tried), for writ of error *coram nobis*. This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney* v. *Holohan*, 294 U. S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process. See *Lamb* v. *Florida*, 91 Fla. 396; *Skipper* v. *Schumacher*, 124 Fla. 384; *Jones* v. *Florida*, 130 Fla. 645. In brief, a person in Florida who claims that his incarceration is due to "failure to observe that fundamental fairness essential to the very concept of justice", *Lisenba* v. *California*, *supra*, at p. —, even after his sentence has been duly affirmed by the highest court of the State, has full opportunity to have a jury pass on such a claim provided he first makes an adequate showing of the substantiality of his claim to the satisfaction of the Supreme Court of Florida. The decisions of that Court show that a naked allegation that a constitutional right has been invaded is not sufficient. A petitioner must "make a full disclosure of the specific facts relied on", and not merely his conclusions "as to the nature and effect of such facts". The proof must enable the appellate court to "ascertain whether, under settled principles pertaining to such writ, the facts alleged would afford, at least *prima facie*, just ground for an application to the lower court for a writ of error *coram nobis*." *Washington* v. *Florida*, 92 Fla. 740, 749; see *Skipper* v. *Schumacher*, 124 Fla. 384, 405-08; *Skipper* v. *Florida*, 127 Fla. 553, 554-55. The latest formulation by the Florida Supreme Court of its function in considering an application for leave to apply to the trial court

for a writ of error *coram nobis* is found in *McCall v. Florida,* 136 Fla. 349, 350 (1939): "In the exercise of its discretion in matters of this sort the court should look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof. This duty we have met and we are convinced that to grant the petition would be no less than a trifling with justice."

Such a state procedure of course meets the requirements of the Due Process Clause. Vindication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each State is free to devise its own way of securing essential justice in these situations. The Due Process Clause did not stereotype the means for ascertaining the truth of a claim that that which duly appears as the administration of intrinsic justice was such merely in form, that in fact it was a perversion of justice by the law officers of the state. Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury.

Florida then had ample machinery for correcting the Constitutional wrong of which Hysler complained. But it remains to consider whether in refusing him relief the Supreme Court of Florida denied a proper appeal to its corrective process for protecting a right guaranteed by the Fourteenth Amendment.

Hysler's claim before the Supreme Court of Florida was that Baker repudiated his testimony insofar as it implicated Hysler and that he now named another man as the instigator of the crime. Considering the fact that this repudiation came four years after leaden-footed justice had reached the end of the familiar trail of dilatory procedure, and that Baker now pointed to an instigator who was dead, the Supreme Court of Florida had every right and the plain duty to scrutinize this repudiation with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in three trials, the voluminous records of which had been before that Court.[1]

The Florida Supreme Court had before it four affidavits by Baker. The affidavits must be considered here as they were before that Court—in their entirety. One was made on April 7, 1941;

[1] In denying Hysler's application the Supreme Court of Florida specifically stated that it was taking judicial cognizance of its own records. 146 Fla. 593, 594-95.

the second on April 8 between six and seven in the evening; another between eight-thirty and nine of the same night; the fourth, the next day. The most striking feature of this series of retractions is that in his first and spontaneous new account of the happenings that led to the murders on November 25, 1936, Baker does not attribute to coercion or inducements made by state authorities his testimony at the trials that Hysler was the instigator of the crimes. On the contrary, according to Baker's new story, after the killing of the Surrencys, Tyler and he "agreed between them while they were in Cracker Swamp in the Marietta section of Duval County, that they would lay the blame of the planning of the robbery of the Surrencys upon Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well, and for the reason that the Hyslers bore a bad reputation in Duval County, and for the further reason that Clyde Hysler's father had plenty of money and they thought that by laying the planning of the robbery of the Surrencys on Clyde Hysler that his father and his other relatives would put up sufficient money to get Clyde Hysler out of the trouble and that by laying it on to Clyde Hysler, that he, James Baker, and Alvin Tyler would escape the death penalty . . . ".

There is no suggestion whatever in this explanation of what is now claimed to have been a false accusation that it was induced from without. Baker gives five reasons for having fixed the blame on Hysler—an explanation to which he had adhered for more than four years—but all these reasons make Baker and Tyler the spontaneous concocters of the alleged false charge. It was not until the next day, that Baker, under leading questions, suggested that his account of the crime, contemporaneous with it, was induced by the hope of getting "life instead of the chair."[2] Even in this second affidavit there is no hint that the prosecutor had any knowledge

[2] "Q. Then it was a definite promise from Mr. Harrell, the State's Attorney to keep you from burning?

A. He said that he would see that I would get life, but that he would see that I didn't stay at the chain gang but three years.

Q. You say he played off sick to keep from prosecuting you?

A. Yes, sir, Mr. Simpson his assistant and Mr. Hallows prosecuting, the Judge had ordered him to handle the Hysler case straight through, cause Mr. Hollows was not familiar with the case.

Q. Do you know whether or not Mr. Harrell had gone out of office and Mr. Hallows had taken office?

A. Yes, sir, I think he had and that was why the Judge wanted him to carry this thing on through, but I don't be sure.

Q. Is there anything else you want to say along that line about those threats or beatings?

A. No, sir, that is all I can think of right now."

of the falsity of his implication of Hysler.[3] Only after a third session did Baker, in an ambiguous reply to another leading question, convey a suggestion of the prosecutor's knowledge of the use of force preceding Baker's original testimony. This is the only testimony that bears on the complicity of the prosecutor in the alleged coercion of Baker's testimony:

"Q. Baker do you know whether or not Mr. Harrell [the State's Attorney] knew if you was beat up to make you testify?.

A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

Q. When you made that statement you couldn't set down?

A. Yes, sir, and I can't set down good, and I wish you and those men could see that now.

Q. No, we want care to see—that's all you want to say.

A. (Baker nodding his head indicating yes.)"

In his final affidavit on April 9, Baker returns to the alleged promise of the State's Attorney that he would not "burn" him. But there is this time no suggestion that the prosecutor induced or knew of any false testimony by Baker.

We have seen that according to Baker's first statement on April 7, his attribution of Hysler's responsibility was spontaneous and uncoerced. The circumstances of the case reinforce this and cast a proper scepticism upon Baker's subsequent claims of coercion. According to the affidavits of the two lawyers who represented Hysler at his trials, they examined Baker and Tyler "at great length" in the presence of counsel for the two accomplices and "said witnesses were particularly questioned as to who was involved in said case, and said witnesses denied that anyone was involved in said case other than the defendants named in the indictment; that said witnesses further denied that any statements previously

[3] "Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?

A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hubert did talk to me, that he would get me life imprisonment—life instead of the chair.

Q. Mr. Hubbert talked to you and made promises that you would get life instead of the chair?

A. Yes, sir.

Q. What police —

A. That's what it was, police officers and John Harrell.

Q. John W. Harrell, the State's Attorney at that time?

A. Yes, sir.

Q. Did Mr. Harrell tell you that he would help you get a life sentence if you would testify against Clyde Hysler?

A. He said he wouldn't burn me, that he, Mr. Acosta and Mr. Carson would get me out in three years time."

made by them to law enforcement officers were made under duress or with any hope or expectation of reward". And the present Chief Justice of Florida in his separate opinion on Baker's appeal characterized Baker's confession as "entirely free and voluntary". 137 Fla. 27, 29.

In addition to these four affidavits by Baker, there were four subsidiary affidavits by others. Their want of significance is sufficiently attested by the fact that on the motion for rehearing of this cause before the Florida Supreme Court, reliance was placed exclusively upon the Baker affidavits and no reference whatever was made to these subsidiary affidavits. Nor was reliance upon them made here.

The essence of Hysler's claim before the Supreme Court of Florida was that his conviction was secured by unconstitutional means, that Baker was coerced to testify falsely by responsible state officials. The Court had to judge the substantiality of this claim on the basis of all that was before it, namely, the petition with its accompanying affidavits and the records of prior cases arising out of the same crime. The Court concluded that Hysler's proof did not make out a *prima facie* case for asking the trial court to reconsider its judgment of conviction. However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding that the "petition" did not show the responsibility of the state officials for the alleged falsity of Baker's original testimony to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of error *coram nobis*.[4] And our independent examination of the affidavits upon which his claim was based leaves no doubt that the finding of insubstantiality was justified. It certainly precludes a holding that such a finding was not justified.

[4] The opinion of the Florida Supreme Court on petitioner's motion for rehearing states, *inter alia*, that: "The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness [Baker], or that the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer. The petition does not show that any alleged maltreatment of witness was inflicted by any officer of the trial court or that same was known to any officer of the trial court." 146 Fla. 593, 594.

~~The Florida Supreme Court was under a special duty to determine the substantiality of such a claim as was here made. Under Florida law, if permission is given by the Supreme Court to apply to the trial court and that court denies the writ, the petitioner may seek review for such denial in the state Supreme Court. And he may also seek review from a final judgment rendered against him at the trial on the writ of *coram nobis*. But "if the trial court erroneously grants a writ of *coram nobis* the state has no right to an appellate review of such order", *Lamb* v. *State*, 91 Fla. 396, 400. The state Supreme Court thus has a grave responsibility in petitions of this sort in view of the non-reviewability, even in face of clear error, of action favorable to a defendant in the trial court.~~ The state's security in the just administration of its criminal law must largely rest upon the competence of its trial courts. But that does not bar the state Supreme Court from exercising the vigilance of a hardheaded consideration of appeals to it for upsetting a conviction. That in the course of four years witnesses die or disappear, that memories fade, that a sense of responsibility may become attenuated, that repudiations and new incriminations like Baker's on the eve of execution are not unfamiliar as a means of relieving others or as an irrational hope for self—these of course are not valid considerations for relaxing the protection of Constitutional rights. But they are relevant in exercising a hardy judgment in order to determine whether such a belated disclosure springs from the impulse for truth-telling or is the product of self-delusion or artifice prompted by the instinct of self-preservation.

Our ultimate inquiry is whether the State of Florida has denied to the petitioner the protection of the Due Process Clause. The record does not permit the conclusion that Florida has deprived him of his Constitutional rights.

Petitioner also claims that Florida has denied him the "equal protection" of its law. This contention is plainly without substance. If Hysler had been singled out for invidious treatment by the Florida Supreme Court, he could properly complain here. Compare *Yick Wo* v. *Hopkins*, 118 U. S. 356; *McFarland* v. *American Sugar Co.*, 241 U. S. 79. But it is not a fact that the Florida Supreme Court has granted such applications in other cases but not in Hysler's. See, e. g., *Skipper* v. *Florida*, 127 Fla. 553; *McCall* v. *Florida*, 136 Fla. 349.

Affirmed.

Mr. Justice BLACK, dissenting, with whom Mr. Justice DOUGLAS and Mr. Justice MURPHY concur.

The application denied by the Supreme Court of Florida alleges that Tyler and Baker, the accomplices in the murder for which Hysler was convicted, confessed and gave false testimony against Hysler because they were "coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated," and because they were promised life sentences instead of the electric chair. Sworn statements of Baker made in a state prison in the presence of prison officials were presented in support of these allegations, as were corroborative affidavits of four others. Tyler, a fugitive from justice, is unavailable to the petitioner as an additional source of verification.

The Florida Supreme Court has stated that the petition does not assert that "the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer." In *Mooney* v. *Holohan*, 294 U. S. 103, this Court held that the use by a state of testimony known by its "prosecuting authorities" to be false is a denial of due process of law. I do not, however, regard this as a proper occasion to determine whether the rule of *Mooney* v. *Holohan* applies only where the guilty knowledge is that of "the prosecuting officer" and not any other responsible official. For even if every representative of the state believed that the confession of Tyler and Baker were true in every detail, other allegations of the petitioner make out a denial of due process on independent grounds, upon which the scope of *Mooney* v. *Holohan* has no bearing. In those cases in which this Court held that a conviction based on confessions wrung from the accused or his accomplices by third-degree methods was offensive to the guarantees of the due process clause, there are no indications that the knowledge of any of the state officials involved as to the truth or falsity of the confessions was deemed relevant.[1] And if the allegations of Hysler's petition are true, that is, if Tyler and Baker were held incommunicado and tortured into supplying the controlling testimony at Hysler's trial, his conviction is tainted with a measure of brutality which I had supposed was sufficient, without more, to establish a violation of Constitutional rights. I am therefore unable to agree with the state-

[1] *E. g.*, Brown v. Mississippi, 297 U. S. 278; Chambers v. Florida, 309 U. S. 227.

ment of the Florida Supreme Court that "if all petitioner alleges in his petition had been fully made known to the trial court and to the jury which tried the defendant-petitioner, it would not have precluded the entry of the judgment upon a verdict of guilty of Murder . . . ." Nor do I go along with the intimations of approval of that statement to be found in the opinion which this Court has just handed down.

The opinion of this Court does not rest solely on the ground that Hysler's allegations if true fail to establish a denial of due process. The Court finds in the opinion of the Florida Supreme Court a determination that "Hysler's proof" was insufficient "to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of error *coram nobis*." But "Hysler's proof" is nowhere mentioned in the opinion below, and of the eight reasons there given for denying Hysler's petition, the only one which touches in any way upon the credibility of his allegations accepts them as true.

To be convinced that the Florida Supreme Court did not pass on the credibility of Hysler's allegations but merely decided that these allegations however fully proved would not make out a violation of due process, I should need to look no further than the opinion below. But more support for this interpretation of Florida's denial of Hysler's petition is amply available in other decisions of its highest court. In *Washington* v. *State*, 92 Fla. 740, 749, for example, the Florida Supreme Court said the issue to be determined when such a petition is before it is "whether . . . the *facts alleged*"—not the *proof*—"would afford, at least *prima facie*, just ground for an application to the lower court for a writ of error *coram nobis*." That is not to say that the Florida Supreme Court will not deny a petition when the facts alleged are so patently incredible that further pursuit of the remedy would be a frivolous imposition upon the trial court. Thus, in *McCall* v. *State*, 136 Fla. 349, 350, where the allegations of the petitioner denied his guilt for the first time, were without any supporting affiavits, and were "positively and directly contradicted" by himself and other witnesses at the trial, the court denied the petition, stating that to grant it "would be no less than a trifling with justice." Even under such circumstances, however, the court explicitly pointed out that it had looked into "the probability of the truth" of the allegations.

And where there is a color of plausibility in the allegations, the court has been meticulous to give the petitioner ample opportunity to prove them. In *Chambers* v. *State*, for example, Mr. Justice Buford, who spoke for the court in its opinion on Hysler's petition said: "The petition for leave to file writ of error *coram nobis* presents allegations which, if true, would constitute ground for issuing the writ. It is not the province of this Court to determine whether or not such allegations are true. The determination of such question may be had in the circuit court under issues duly made for that purpose." 111 Fla. 707, 713.

It must also be borne in mind that if the proof accompanying a petition for leave to apply for a writ of error *coram nobis* had to be so full as to establish conclusively the truth of the allegations, petitioners who required the amplifying or corroborative evidence of inaccessible or unwilling witnesses would be effectively barred from access to this remedy, for they would never have the opportunity to utilize the compulsory process which a trial of the facts would afford. In the light of Florida's liberal treatment of other petitioners in other cases,[2] and the unambiguous explanation its courts have given where petitions have been denied, I cannot impute to the Florida Supreme Court, on the basis of its opinion in this case, a decision that Hysler's "proof" was inadequate to support his allegations.

Although it is at best not clear that the court below has canvassed the issue of credibility, this Court has not hesitated to do so. In the opinion just announced there has even been a recital of considerations relevant in determining whether the disclosure made by Baker "springs from the impulse for truth-telling or is the product of self-delusion or artifice prompted by the instinct of self-preservation." And the Court has apparently concluded that Hysler's allegations are so patently incredible that due process does not require a hearing. Where, as here, allegations that controlling testimony was extorted by third-degree methods are supported by sworn statements and not denied by anyone, a summary rejection of them without hearing by the court of first instance would raise serious questions of compliance with the Constitutional requirement of a fair trial.[3]

[2] See Nickels v. State, 86 Fla. 208; Lamb v. State, 91 Fla. 396; Washington v. State, 92 Fla. 740; Chambers v. State, 111 Fla. 707, 113 Fla. 786, 117 Fla. 642.

[3] Cf. Mooney v. Holohan, *supra*; Smith v. O'Grady, 312 U. S. 329.

Under such circumstances, I should suppose this Court would be particularly reluctant to make the original and only disposition itself of what it treats as a major issue of the case: the credibility of Hysler's allegations.

The Supreme Court of Florida declined even to consider the credibility of these allegations, proceeding on the assumption—erroneous if tested by principles which I believe decisions of this Court have affirmed[4]—that if true, they would be insufficient to impugn the conviction. Having corrected this erroneous assumption, this Court, in my opinion, should allow the Florida courts to make their own disposition of the issue they have not considered. We granted certiorari because of a "solicitude, especially where life is at stake, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment." That solicitude would seem to call for remanding this case for further consideration below. I cannot see why it should impel this Court to sustain the conviction upon a gratuitous disposition of an issue which the state court might resolve otherwise.

In cases raising no issue of life or death this Court has not hesitated to remand to the lower court for further proceedings where ambiguities in the opinion below beclouded the ground of decision.[5] The vital issues here and the manner of treatment below compel me to believe that a like procedure should be followed now. Because the basis for my belief can best be shown by reference to the record, I am adding excerpts from the petition and accompanying exhibits as well as the whole of the opinion of the Florida Supreme Court in an appendix.

Appendix.

I. Excerpts from Hysler's petition for leave to apply for a writ of error *coram nobis*:

". . . Alvin Tyler and James Baker who were co-defendants of the petitioner, Clyde Hysler, and upon whose testimony the State of Florida relied upon for a conviction of petitioner was coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated in order to compell the said witnesses,

[4] See cases cited in footnote 1, *supra*, and Canty v. Alabama, 309 U. S. 629; White v. Texas, 310 U. S. 530; Lomax v. Texas, 313 U. S. 544; Vernon v. Alabama, 313 U. S. 547.

[5] Villa v. Van Schaick, 299 U. S. 152; State Tax Comm'n v. Van Cott, 306 U. S. 511; Minnesota v. National Tea Co., 309 U. S. 551.

Tyler and Baker to give testimony at the trial of said cause against petitioner and to implicate said petitioner in the killing of Mrs. Mamie Surrency; and further that the said witnesses, Tyler and Baker were promised immunity from the electric chair, by John W. Harrell and further promised if they would implicate Clyde Hysler in said murder and testify against him during the trial of said cause that he as State's Attorney of the Fourth Judicial Circuit of Florida together with other law enforcing officers of Duval County, Florida would see that he did not get the chair, and that they would procure a pardon and have him released from the State Penitentiary after serving three (3) years of his sentence, all of which is more particularly described by reference to a statement and affidavit made by the said James Baker on the 7th day of April, A. D. 1941, also by further affidavit and statement made by the said James Baker on the 8th day of April, A. D. 1941, and also by statement and affidavit made by the said James Baker on the 9th day of April, A. D. 1941, said affidavit being marked 'A-b and c' respectively and hereby made a part of this petition as fully as though set out herein in haec verba. And for further reason that said affidavits show that the said petitioner was not implicated in the murder of the said Mrs. Mamie Surrency but that one Joe Peterson, Sr. was the person implicated in said murder and not the petitioner, Clyde Hysler, all of which is set out herein more fully in the affidavits herein above referred to and further substantiated by photostatic copies of the following affidavits, to-wit; affidavit of one Ed. Mosley; affidavit of one A. J. Mooney; affidavit of one Mrs. Ruby Crews and affidavit of one Rudolph J. Dowling, said photostatic copies being marked 'd-e-f and g' respectively, and each of said affidavits being hereto attached and hereby made a part of this petition as fully as though set out herein in haec verba.

"That the said witnesses, Alvin Tyler and James Baker immediately after and following their arrest were held incommun-cado for a long period of time without being allowed the benefit and advice of counsel, without being allowed to see or confer with their friends or relatives and without being allowed to confer with the attorneys for the petitioner; that said witnesses, Tyler and Baker were removed from the Duval County Jail and confined in the State Penitentiary at Raiford, Florida with instructions to allow no one to communicate with them for a long period of time immediately following their arrest, and it became necessary for the attorneys for petitioner to procure an order of the Circuit Court of Duval County for permission to confer with said witnesses several weeks after their arrest, and then only in company with, and in the presence of the attorneys appointed by the Court to represent said witnesses and said attorneys for petitioners made diligent effort to ascertain from said witnesses facts about which they would testify to in trial of said petitioner, and thereby used diligent effort in trying to procure the information as set out herein by the respec-

tive affidavits by the witness, James Baker, but said witness Baker was afraid to divulge the truth to the attorneys for the petitioner as set out herein in the said affidavits, a-b and c hereto attached, and that said petitioner was denied a fair and impartial trial by reason of the coercion and intimidation of the witnesses, Alvin Tyler and James Baker and the hope of reward promised them as hereinabove set forth, and has by reason thereof denied equal protection of the law as guaranteed to him by the 14th Amendment to the United States Constitution and was thereby denied due process of the law as guaranteed by the 5th Amendment of the United States Constitution.

. . . . . .

"That had the said witnesses, Tyler and Baker not been intimidated, coerced and promised immunity from the electric chair by the law enforcement officers in Duval County as described in affidavits 'a-b and c' hereto attached, and by John W. Harrell as herein above described, and the said witnesses had been left free to testify and tell the truth as to the said Joe Peterson, Sr. being the person involved in the murder of the said Mrs. Mamie Surrency instead of the petitioner, said testimony would have prevented the rendition of the judgment, verdict and sentence of petitioner in this cause, and if another trial be had of this cause, this petitioner would be acquitted.

. . . . . .

"That petitioner further alleges that the affidavits of the witness, James Baker, being affidavits hereto attached and marked 'a-b and c' and made by the said James Baker freely and voluntarily on his part and without any suggestion or prompting on the part of petitioner or any one on his behalf, and that the statements contained in said affidavits were made in the presence of several prison officials at Raiford, Florida after said James Baker made a voluntarily request to see and talk with the attorney for petitioner."

II. Excerpts from exhibits accompanying Hysler's petition: (These are from the transcript of three conferences held in a Florida prison on April 7 and 8, 1941. Baker was under oath. Where the statements are not in narrative form, the questioner is Hysler's attorney.)

". . . James Baker . . . deposes and says:

That after the killing of Mr. and Mrs. Sarrancy near Grand Crossing in Jacksonville, Florida on the 23rd day of November 1936, that he and Alvin Tyler, the man who was with him at the time of the said killing agreed between them while they were in Cracker Swamp in the Marietta section of Duval County, that they would lay the blame of the planning of the robbery of the Surrancys upon Clyde Hysler because they had had consider-

able liquor dealings with Clyde Hysler and knew him well, and for the reason that the Hyslers bore a bad reputation in Duval County, and for the further reason that Clyde Hysler's father had plenty of money and they thought that by laying the planning of the robbery of the Surranceys on Clyde Hysler that his father and his other relatives would put up sufficient money to get Clyde Hysler out of the trouble and that by laying it on to Clyde Hysler that he, James Baker and Alvin Tyler would escape the death penalty, that in truth and fact, that Clyde Hysler was not implicated in the planning of the robbery and had nothing to do with the killing of Mr. and Mrs Surrancy, but that one Joe Peterson, Sr. was the man who planned the robbery and hired the said James Baker and Alvin Tyler to perform the robbery after being advised by the said Joe Peterson that it would be no trouble, and that Mr. Surrancy did not carry a gun, and all they would have to do would be to point the pistol at him and take the money, that affiant further deposes and says:

That Clyde Hysler was in no way responsible for the attempted robbery of Mr. and Mrs. Surrancy; that he had nothing to do with it, and the man who planned the robbery and was supposed to protect us in the robbery was Joe Peterson and not Clyde Hysler; that Joe Peterson was in the immediate vicinity when the attempted robbery and the killing of the Surrancys took place, and had it not been that Joe Peterson planned the robbery and hired Alvin Tyler and myself to rob Mr. Surrancy they would probably have still been living and we would not be in any trouble.

. . . . . .

"Q. Now Baker, I don't want you to tell me anything except the truth, I want you to tell me if Joe Peterson was the man that got you into all of this instead of Clyde Hysler.

A. Yes, sir, he is the man.

Q. Then you and Alvin Tyler planned to lay this all on Clyde Hysler in order to try to get out of it yourself or to get a life sentence instead of the chair?

A. Yes, sir.

. . . . . .

"Q. You recall what officers brought you over here?

A. Mr. Gene Griffen and Mr. Dick Barker and some more officers.

Q. Now what threats or promises did they make you to testify and implicate Clyde Hysler?

A. Well, Mr. Griffen and them didn't, they didn't make no promises, Mr. Hulbert did talk to me that he would get me life imprisonment—life instead of the chair.

Q. Mr. Hubbert talked to you and made promises that you would get life instead of the chair?

A. Yes, sir.

Q. What police——

A. That's what it was, police officers and John Harrell.

Q. John W. Harrell, the State's Attorney at that time?

A. Yes, sir.

Q. Did Mr. Harrell tell you that he would help you get a life sentence if you would testify against Clyde Hysler?

A. He said he wouldn't burn me, that he, Mr. Acosta and Mr. Carson would get me out in three years time.

Q. Was Detective Cannon and—you was talking about and Inspector Acosta—

A. The two men that arrested me, yes sir.

Q. Now from the time you was arrested, Baker, how long was you kept to yourself before you was allowed to talk to your lawyer or your friends?

A. From the time I was arrested until the 21st of January, till we went back and had my trial set.

Q. The day you were arraigned in Circuit Court for the trial?

A. Yes, sir.

Q. You was held to your self without being allowed to communicate with any of your friends or your lawyer?

A. Yes, sir.

Q. When was you arrested?

A. It was on the 23rd—24—26— when was Thanksgiving Day—just a few days.

Q. You was arrested just a few days after Thanksgiving?

A. Yes, sir.

"Q. Did any of those officers threaten you?

A. They carried me in a dark room——

Q. That was here?

A. No, sir, that was in Jacksonville, they carried me out to Mareitta and whipped me.

Q. What was that with?

A. Something covered up in canvas, I don't know what it was and a piece of hose and something looked like a pine limb.

Q. You remember any of those names?

A. Yes, sir.

Q. Who were they?

A. Mr. Woods, R. L. Woods, and Mr. Carson slapped me two or three times and gave them the black jack to beat me with.

Q. That was in the presence of Mr. Woods, Carson and Acosta?

A. Yes, sir.

Q. That was to try to make you implicate Mr. Hysler in the robbery of Mr. Surrency and Mrs. Surrency?

A. Yes, sir.

Q. And if it hadn't been for the beatings and threats and the promises to get you out of here in three years as you have stated above would you have implicated Mr. Hysler in the case at all?

A. No, sir, cause I told them I didn't no anything about it and another thing, between Mr. Hysler's first trial and last one,

Mr. Harrell came down to the County Jail after I was allowed to see people, I said, don't you know that if you burn Mr. Hysler you will have to burn me too, and he said he could burn the whole Hysler family and don't burn me cause he and Mr. Sidney Hulbert, Mr. Carson and Mr. Cannon and some more officers was going to run the County as long as they were running it.

"Q. Baker, how many times did the officers threaten you and beat you after you were arrested?

A. They beat me about three o'clock in the morning to ten o'clock before they got me to say anything.

Q. It was the police made you tell the sheriff's office?

A. Yes, sir.

Q. Was you afraid not to tell them what they wanted you to, afraid they would beat you some more?

A. Yes, sir, if them—I said two words they would slap me, before the sheriff bunch got there they had sent out and bought me dinner, give me $5.00 or $6.00 dollars in money, and said don't tell any body about me being whipped, if anyone asked me, tell them no.

Q. Then it was a definite promise from Mr. Harrell, the State's Attorney to keep you from burning?

A. He said that he would see that I would get life, but that he would see that I didn't stay at the chain gang but three years.

"Q. Baker what about the remarks you wanted to make?

A. Where they kicked me.

Q. That at Jacksonville police station?

A. Yes, sir.

Q. Who was that?

A. Mr. Carson, thats who had me at that time, he taken me down there where a bunch of police was shooting pool.

Q. What all did they do to you?

A. Those officers down there asked him if he made me tell him wha. they wanted to know, and Mr. Carson—Mr. Carson said not yet, and they said, turn him loose with us about 25 minutes and we will make him say anything they wanted me to say, and he told them to take me and hold me until they went up into the office and make a call, and while he was gone to make a call they carried me back into a room and put a coat over my head and went to beating me, I got scars on me now, I want to show them to you and its what you call risons, you can get your doctor and he will tell you what was caused from blows—

Q. You still have scars on you from that beating?

A. Yes—.

Q. Was those beatings that caused those scars on you to tell on Clyde Hysler?

A. To make me tell anything.

Q. Did they mention Clyde Hysler's name to you while they were beating you?

A. Yes, sir.

Q. Do you know the names of those officers?

A. No, sir, those were new officers to me, they were speed cops, had those things on their shoulders.

Q. Did any of them tell you that Clyde Hysler was mixed up in the killing or such as that?

A. They said they knew he was in it—and after I told how it was they made me implicate him.

Q. Implicate him?

A. Yes, sir.

Q. As a matter of fact, Hysler was not mixed in it but it was Joe Peterson——

A. They had me hand cuffed behind my back and I was chained and beat me. . . . .

Q. Baker do you know whether or not Mr. Harrell knew if you was beat up to make you testify?

A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

Q. When you made that statement you couldn't set down.

A. Yes, sir, and I can't set down good, and I wish you and those men could see that now."

III. The opinion of the Supreme Court of Florida on motion for rehearing: (No opinion accompanied the original denial of Hysler's petition.)

"Buford, J.:

On motion for hearing on application for an order for leave to apply to the Circuit Court of Duval County for a writ of error coram nobis to review the judgment of conviction of petitioner of the offense of Murder in the First Degree heretofore entered in that Court, on grounds stated in the petition, we have denied the petition for reasons as follows:

(a) This Court may take judicial cognizance of its own records and the record lodged in this Court on the writ of error to the judgment of conviction of the petitioner shows ample evidence to support the judgment of conviction without the aid of the testimony given on that trial by the witness James Baker.

(b) Writ of error coram nobis will not lie because of false testimony given at the trial by important witness. Lamb. v. State, 91 Fla. 396, 107 Sou. 535.

(c) Matters properly presentable for writ of coram nobis are such as would have prevented conviction and not such as may have caused a different result. Chesser v. State, 92 Fla. 754, 109 Sou. 906.

(d) If witness Baker swore falsely at defendant's trial, that fact was known to petitioner at the time of the trial. Washington *v.* State, 95 Fla. 289, 116 Sou. 470; Pike *vs.* State, 103 Fla. 594, 139 Sou. 196.

(e) The allegations of the petition do not show that the prosecuting attorney had any guilty knowledge of the alleged maltreatment of the witness, or that the alleged falsity of the testimony of the witness Baker was known to the prosecuting officer.

(f) The petition does not show that any alleged mal-treatment of witness was inflicted by any officer of the trial court or that same was known to any officer of the trial court.

(g) The records of this Court, of which we take judicial cognizance, show that petitioner was convicted on trial held subsequent to the trial and conviction of the witness Baker of the offense of Murder in the first degree without recommendation to mercy, and that both trials were conducted on behalf of each defendant by able, diligent and faithful counsel.

(h) If all petitioner alleges in his petition had been true and had been fully made known to the trial court and to the jury which tried the defendant-petitioner, it would not have precluded the entry of the judgment upon a verdict of guilty of Murder in the first degree having been returned by the jury.

So it is, the petition is insufficient to require us to grant same and for such reasons the same was denied and the petition for rehearing is likewise denied.

So ordered.

Terrell, J. Thomas and Chapman, J. J. Concur.

Brown, C. J. Dissents."